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REPORTS OF CASES

DECIDED IN THE

Oregon
SUPREME COURT

OF THE

STATE OF OREGON

FRANK A. TURNER
REPORTER

VOLUME 50

SALEM, OREGON
WILLIS S. DUNIWAY, STATE PRINTER
1908

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OF THE

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* Frank A. Turner was appointed Reporter on August 4, 1908, succeeding Robert G. Morrow, resigned.

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IN THE STATE OF OREGON.

August 1, 1908.

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Josephine		
Klamath	{	GEORGE NOLAND.
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Second Judicial District—

Coos	{	JAMES W. HAMILTON.
Curry		
Douglas		
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Lane		
Lincoln		

Third Judicial District—

Linn	{	GEORGE H. BURNETT, Dept. No. 1.
Marion		
Polk		
Tillamook	{	WILLIAM GALLOWAY, Dept. No. 2.
Yamhill		

Fourth Judicial District—

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		ROBERT G. MORROW, Dept. No. 2.
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Clatsop		
Columbia		
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Morrow	{	HENRY J. BEAN.
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Hood River		
Wasco		

Eighth Judicial District—

Baker	{	WILLIAM SMITH.
-------------	---	----------------

Ninth Judicial District—

Grant	{	GEORGE E. DAVIS.
Harney		
Malheur		

Tenth Judicial District—

Union	{	JOHN W. KNOWLES.
Wallowa		

Eleventh Judicial District—

Gilliam	{	EDWIN V. LITTLEFIELD.
Sherman		
Wheeler		

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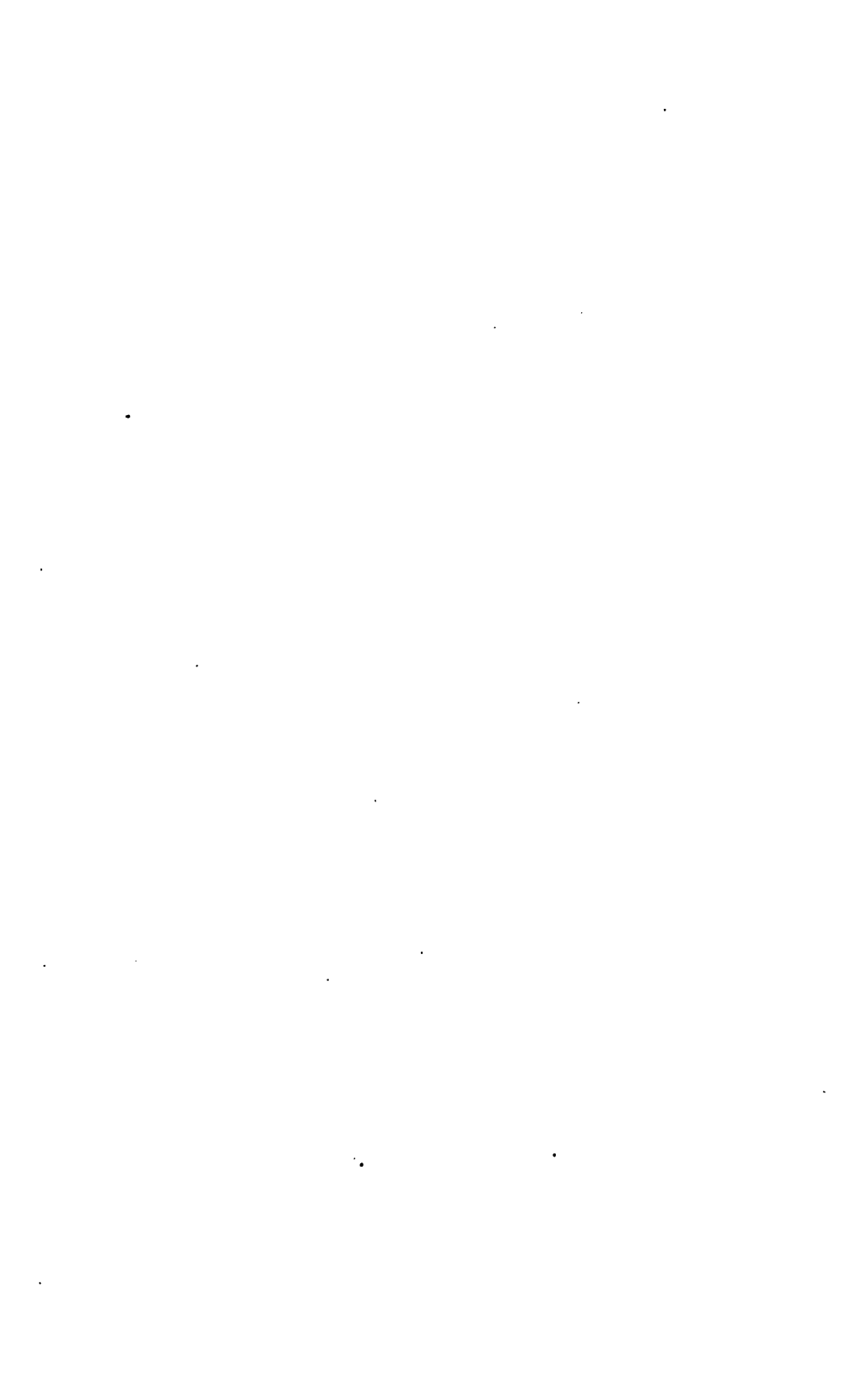
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IN MEMORIAM

HONORABLE JOHN BRECKENRIDGE WALDO.

On the convening of the court on January 15, 1908, Judge William P Lord, formerly Chief Justice of the Supreme Court of Oregon, presented to the court, with appropriate and eloquent remarks, the following memoir and resolutions adopted by the Bar Association of Marion County on January 6, 1908, and moved that they be spread upon the journal of this court and printed in the next volume of the Oregon Reports, which was accordingly ordered:

John Breckenridge Waldo, ex-Chief Justice of the Supreme Court of the State of Oregon, died at his residence in the Waldo Hills, near Salem, on September 2, 1907. He was born October 6, 1844, upon the old homestead located by his father, Daniel Waldo, the noted pioneer, whose honorable name the Waldo Hills now bear. He received a common school education, and was afterwards graduated from Willamette University in the class of 1863. He was admitted to the bar in 1870. In 1877 he married Miss Clara Humason, who, with a daughter, Miss Edith Waldo, survives him. In 1880 he was elected a member of the Supreme Court of Oregon, serving six years. In 1889 he represented Marion County in the Oregon Legislative Assembly. His public career was brief, but he was scarcely less conspicuous in private life than as a public official. Surrounded by the broad and fertile acres of the old homestead where he was born, where he lived almost all his days, and where finally he passed away, he was the oracle of a wide constituency, and with generous hand dispensed hospitality suggestive of the landed proprietors of the old Colonial days.

Among the oldest of Oregon's native sons, of stalwart pioneer stock, he stood apart from his fellows, a stranger to the narrow selfishness which too largely characterizes those of crowded cities, a splendid product of the rugged pioneer days. He had the altruism which comes from pioneer hospitality and kindness, the instincts of the pioneer, and he was a lover of the woods and streams and the mountains. Of studious and methodical habits, unobtrusive to the point of timidity in dealing with men in the mass, he was absolutely fearless in his expression of opinion and in dealing with all matters of public interest. Without special ambition, he despised the arts of the courtier and the time-server. He neither sought nor cared for popularity. A man of intense convictions and often severe and abrupt in his expression of opinion, he was withal a kindly and courteous gentleman. In his family relations, in all of his relations to the public, as a friend and as a neighbor, he was a model citizen. His death is the loss of one who as a lawyer and judge was distinguished for his erudition in the sources of our jurisprudence; who as a legislator

reckoned the rights of the common people as the object of his most jealous care; who as a man and neighbor was ever kind and obliging, and in all these relations his integrity was as firm and unyielding as the oaks of his native hills.

He was devoted to the law, especially the common law, and he studied with industry and became well versed in its legal principles. The theory of the law, its aim to subserve justice, its logical formulas, its subtle and exact reasoning, its elasticity and its capability to solve abstract and complicated questions, and adjust controverted rights affecting persons or property, appealed to his innate sense of right and justice and love of fair play and dealing. The ideal government to his mind was a government built on constitutional principles, and regulated by law, intelligently and impartially administered. He was not a trial lawyer; he had no love for its wranglings and disputations; his mind was not constituted for the contentions and struggles of trial practice; he had little imagination and no disposition to indulge in rhetorical excursions; he was fond of wit and repartee, but seldom indulged in it himself; he liked to hear a good story or anecdote, and was a pleased listener, although he rarely told one himself, and when he did, it was usually a good one, full of marrow, and never pointless. It was in the quiet of the study room, or the consultation room, where his mind ranged on its native heath, where interchange of thought and opinion was calm and critical, and where the aim and object was to solve aright and impartially justice between man and man. In this sphere his mind was fitted for the task, and it was usually equal to the undertaking and occasion.

As a lawyer, he was learned, but as a judge he was erudite, in sources of our jurisprudence and its development. And it was in this last capacity he distinguished himself as an able and industrious, an upright and impartial jurist. Devoted to the common law, he delighted in studying and tracing its legal principles in solving matters of litigation, and, possessing a mind at once penetrating, logical and exact, he did not rely on precedent merely in the consideration of a case, but bent all his powers to find out the legal principle involved and to apply it with logical exactness to the solution of the disputed point, citing precedents to fortify it. He had the faculty of stating the facts of a case with remarkable brevity, without sacrificing perspicuity. He brought out the point in dispute sharply and distinctly. In formulating his opinion he was cautious, painstaking and critical, avoiding all diffusiveness or unnecessary elaboration, keeping the legal principles always in sight, and pressing it upon the facts with logical acumen and exactness, and leading by the rationale of his deductions irresistibly to the conclusion reached, so that his opinions were generally short and pointed, rarely obscure, always logical, and their judicial correctness seldom disputed.

There was no element of fear in his mind, nor any dread of consequences, when his convictions became fixed. His first and chief aim was to find out the legal principle which applied to the point in dispute, and to this end, free and frequent discussion with his colleagues and a tireless investigation of the books were the means for its accomplishment; and the result, when reached, passed the question beyond the fear of any consequences to himself, and nothing remained but to declare the law. He was quick to discover

incongruities in arguments, or to fill up gaps in them, when really sound for lack of orderly arrangement, or want of clearness. No pretentious faker of law could deceive or lead his mind astray with a mere juggle of words or specious argument, backed by citations of ancient authorities never read, much less understood. He was a good listener, attentive and patient, not captious, and seldom interrupting, for, like Lord Bacon, he thought an overtalking judge a tinkling cymbal. He liked to hear a good argument, and especially to read one well wrought out, elaborated with fullness and illustrated by references to and copious quotations from the authorities. He wanted to understand all sides of the case, and accorded great liberality in its discussion, considering it to be the duty of a lawyer to aid and instruct the court in the administration of justice. To him the law and its judicial administration was a high calling and imposed ideals of duty that permitted no deviations from truth and justice and scrupulous rectitude. He lived up to his standard and died, loved and regretted.

Your committee, in submitting these resolutions, understands and fully appreciates how valueless they are to assuage the grief of those who loved Judge Waldo, or to portray the man to those who will come after us, but we spread them upon the records, well knowing that we have been unable to say of him as much as his honorable life justifies; and conscious that these resolutions are not perfunctory, but are findings of fact from the undisputable record of this good man's life. In the memory of your committee and all who knew him, Judge Waldo yet lives and exerts beneficent influence for a better social life, a higher ideal of citizenship. Truly it may be said of him, "The light he leaves behind him lies along the paths of men."

L. H. McMahon,
W. M. Kaiser,
Chas. B. Moores.
W. P. Lord,
Geo. H. Burnett,
Committee.

HONORABLE JOHN JOSEPH MURPHY.

On the convening of the court on January 15, 1908, comes Honorable George H. Burnett, Judge of the Third Judicial District of the State of Oregon, and at the request of the Marion County Bar Association presents memoir and resolutions adopted at a Bar Association meeting held on the 6th of January, 1908, upon the death of Honorable John Joseph Murphy, ex-Clerk of this Court, and asks that the same be spread upon the journal of this court and printed in the next volume of the Oregon Reports; which motion is allowed, and it is ordered that said memoirs and resolutions be so entered upon the journal and printed:

John Joseph Murphy, an attorney of this court and for many years a resident of Marion County, was born in Ireland, June 22, 1832, and died near the east entrance of the County Court House in Salem, Oregon, June 19, 1907. He had exceeded by almost five years the measure of life allotted to man by Solomon, and, on the scene of

his professional labors, he was suddenly called to close a long and active career.

In early manhood he came to Oregon from California and took up his residence at Champoege, in the northern part of Marion County. He was a carpenter by trade and pursued that occupation for several years. He was a Justice of the Peace in Champoege precinct in the later sixties, and his characteristic disposition to know all about anything which he undertook and to perform its duties creditably led him to study law for the purposes of that office. He was afterwards elected Sheriff of Marion County, and his connection with the courts as such officer and the legal questions affecting his administration of the shrievalty still further stimulated his research in the law, so that he studied systematically and was regularly admitted to the bar of the Supreme Court of this state in 1873.

He served with ability in the legislature of the state and in various positions in the city government of Salem. He acted for several years as United States Postal Inspector with energy and fidelity. For some sixteen years prior to his death he was Clerk of the Supreme Court of the State of Oregon, and died an incumbent of that office.

In every relation of life, both public and private, his record is one of unvarying integrity; and though many, in the struggles of politics and the law, felt his prowess as an antagonist, yet no one can truthfully assail his honor as friend or foe. He was a pronounced man in whatever he undertook and he was zealous for a friend or against an enemy.

He was in the full sense of the word a self-made man and the architect of his own career. Originally of but limited education, he was determined to improve his mind and enlarge his store of knowledge by pertinacity in study and indefatigability of research.

A warm and generous friend, an opponent to be reckoned with, his earthly activities are ended, and he rests, leaving a respected memory and an honorable career.

William P. Lord,
L. H. McMahon,
W. M. Kaiser,
Charles B. Moores,
George H. Burnett,
Committee.

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CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON.

Argued July 23, decided 20 Aug., rehearing denied 22 Oct., 1907.

STATE v. CARMODY.

91 Pac. 446, 1081.

INTOXICATING LIQUORS—LOCAL OPTION—PRIMA FACIE EVIDENCE.

1. Under the Local Option Law (Laws 1905, p. 47, c. 2), § 10, providing that the order of the county court declaring the result of an election under the act and prohibiting the sale of intoxicating liquors within the prescribed territory "shall be held to be *prima facie* evidence that all the provisions of the law have been complied with in giving notice of and holding such election, and in counting and returning the votes and declaring the result thereof," such order is *prima facie* evidence of the legality of all previous proceedings in the matter of the election, so that it is unnecessary, on a prosecution for a sale in violation of the act, to allege or prove that a valid election was held, or that a majority of the voters was in favor of prohibition, otherwise than to allege and produce such order.

INTOXICATING LIQUORS—JUDICIAL NOTICE OF QUALITIES OF BEER.

2. A charge of unlawfully selling intoxicating liquor is sustained by proof of sale of "beer," without any further description or testimony as to its intoxicating qualities.

CRIMINAL LAW—AIDING AND ABETTING.

3. An instruction, on a prosecution for an illegal sale of intoxicating liquors, that defendant would be guilty if he aided or assisted another in effecting the sale in violation of law, is not error: B. & O. Comp. § 2153, declaring one who aids and abets in the commission of a crime to be a principal.

INTOXICATING LIQUORS—INDICTMENT—BEVERAGE.

4. Under the general rule that an indictment for a statutory misdemeanor is sufficient if it follows the words of the statute and is reasonably certain in its description of the offense intended to be charged, an indictment charging that defendant did "sell and give to one Q six bottles of intoxicating liquor with an intent and purpose of evading the local option law," etc., is not defective in failing to show that the liquor was intended as a beverage, since those are the words of the statute.

INDICTMENT—PLEADING EXCEPTIONS.

5. Exceptions and provisos in criminal statutes need not be pleaded in indictments unless they are descriptive of the offense or necessary to its definition.

From Marion: GEORGE H. BURNETT, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

On October 6, 1906, the District Attorney of the Third Judicial District filed in the circuit court for Marion County an information charging defendant Henry Carmody with the crime of selling intoxicating liquors. The material parts of the information are as follows:

"That at the general election held in the County of Marion, State of Oregon, on the 4th day of June, 1906, the question whether there should be prohibition of the sale of intoxicating liquor for beverage purposes for Horeb Precinct, Marion County, State of Oregon, was submitted to the legal voters of said precinct, county and state, and then and there duly determined by a majority of the legal voters of said precinct at said election in favor of prohibition, and that the sale of intoxicating liquor should be prohibited in said precinct.

That thereafter, on the 15th day of June, 1906, the County Court of Marion County, State of Oregon, duly made and entered of record an order declaring the result of said vote and absolutely prohibiting the sale of intoxicating liquors as a beverage in said Horeb Precinct as a whole, and declaring it to be unlawful to sell, exchange or give away any intoxicating liquor for beverage purposes within said Horeb Precinct until such time as the qualified voters therein by a majority vote declared otherwise.

That thereafter, to-wit, on the 2d day of September, 1906, in the Precinct of Horeb, County of Marion, State of Oregon, Henry Carmody, then and there being, did then and there wrongfully and unlawfully sell and give to one Royal Shaw and William Quinn jointly six bottles of intoxicating liquor, of the value of \$1.50, with an intent and purpose then and there had by him, the said Henry Carmody, of evading the provisions of the local option law of the State of Oregon, proposed by the people of initiative and enacted by the people of the State of Oregon by a majority of the votes cast thereon at the general election held in said state on the 6th day of June, 1904, contrary to the provisions of said law in such cases made and provided, and against the peace and dignity of the State of Oregon."

A demurrer to the information was filed on the grounds:

- (1) That it does not state facts sufficient to constitute a crime;
- (2) that it does not show any violation of the law by defend-

ant; (3) that it does not show that the question of prohibition in Horeb Precinct was submitted to the legal voters of such precinct; (4) that it does not show that the legal voters of such precinct determined by their vote or at all that intoxicating liquor should not be sold or given away in such precinct; (5) that it does not show that the county court had power or authority to make the order of prohibition stated in the information. This demurrer was overruled, and defendant pleaded not guilty. Thereupon a trial was had before the court and a jury.

The testimony for the state tended to show that in September, 1906, two men, Shaw and Quinn, went to the house of defendant, in the Precinct of Horeb, Marion County, and inquired if they could buy some beer from him. Defendant told them he had none, but could get some for them, and went away, returning in a short time; that a few minutes later a man by the name of Baty brought six bottles of beer in a sack and laid them on the floor just inside of defendant's door and went away. Shaw and Quinn had no conversation with Baty about the beer, or the purchase or payment therefor. After Baty had gone they paid defendant \$1.50 for the beer and took it away with them. There was no evidence adduced by the state tending to show the character of the beer, other than it was in bottles having thereon the label of the Albany Brewing Company. The defendant in his own behalf testified that when Shaw and Quinn came to his house they asked him if he had any beer, and he answered in the negative; that thereupon they inquired of him if beer could be procured in the town, and he told them that Baty had a barrel, and they requested him to purchase some from him, as they were not acquainted with Baty; that he went to where Baty was, and told him that Shaw and Quinn wanted six bottles of beer, and soon after he returned Baty brought the beer in a gunny sack and placed it on his porch; that one of the men paid him \$1.50 for the beer, and he handed the money to Baty in their presence; that he did not own the beer, and was acting merely as an accommodation to the purchasers. The state to sustain the issues on its part introduced, and there was admitted over defendant's objection, a certified copy of the order or judgment

of the County Court of Marion County, declaring that a majority of the votes cast in Horeb Precinct, in the June election in 1906, was in favor of prohibition, and prohibiting the sale of intoxicating liquor in such precinct until the legal voters thereof should otherwise determine.

The court instructed the jury that, as a matter of judicial knowledge, beer is an intoxicating liquor; that it was not necessary for the state to prove that defendant owned the beer, or was interested in the money received therefor, but that if the beer belonged to Baty, and the money was received by him, the defendant would be guilty if he aided or assisted Baty in effecting the sale in violation of law. The defendant was convicted, and appeals, assigning error in overruling his demurrer to the information, in the admission of the record of the county court prohibiting the sale of intoxicating liquor in Horeb Precinct, and in the giving and refusal of the instructions referred to.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. William Henry Holmes*.

For the State there was a brief over the names of *A. M. Crawford*, Attorney General, *John H. McNary*, District Attorney, and *C. L. McNary*, with an oral argument by *Mr. John H. McNary*.

Opinion by MR. CHIEF JUSTICE BEAN.

1. The objection to the information, and to the competency of the record of the county court declaring the result of the election and prohibiting the sale of intoxicating liquor in Horeb Precinct, is, in substance, that it is not alleged in the information, nor was it shown at the trial, that a legal and valid election to decide whether the sale of intoxicating liquor should be prohibited in such precinct was ordered or held as required by law. Section 10 of the local option law (Laws 1905, p. 47, c. 2) provides that the order of the county court declaring the result of an election held under its provisions and prohibiting the sale of intoxicating liquor within the prescribed territory "shall be held to be *prima facie* evidence that all the provisions of the law

have been complied with in giving notice of and holding such election, and in counting and returning the votes and declaring the result thereof." The plain purpose of this provision is to make the order of the county court *prima facie* evidence of the legality of all previous proceedings in the matter of the election. It is therefore unnecessary, in a prosecution for a violation of the act, for the state to allege or prove that a valid election was held, or that a majority of the voters in the county, subdivision or precinct, as the case may be, was in favor of prohibition. The order of the county court is *prima facie* evidence of these facts, and the production of such an order is all that is required by the state to make out its case. It is thereafter open to the defense to overcome such *prima facie* case by proving that the essential steps provided by the statute were not taken. This is the interpretation given a similar provision in a local option law by the courts of Missouri and Michigan: *State v. Searcy*, 46 Mo. App. 421; 111 Mo. 236; 20 S. W. 186; *People v. Whitney*, 105 Mich. 622 (63 N. W. 765).

2. The courts are not in accord as to whether a charge of unlawfully selling intoxicating liquor is sustained by proof that the liquor sold was "beer," without anything giving to it a particular description, or evidence that it was intoxicating. In a number of decisions it is held that the word "beer" is a generic term, including both a class of alcoholic liquors and a class of nonintoxicating beverages, such as "root beer," "ginger beer," "spruce beer" and the like, and therefore it cannot be said in its ordinary meaning to imply an intoxicating drink, unless such import has been given it, either by statute or by decisions of the courts. *Blatz v. Rohrbach*, 116 N. Y. 450 (22 N. E. 1049; 6 L. R. A. 669), is a leading example of this class of cases. But Mr. Black says that this is not the approved rule. "On the contrary, the preponderance of authority is to the effect that when the word 'beer' is used, without any restriction or qualification, it denotes an intoxicating malt liquor; that when thus occurring in an indictment or complaint, or in the evidence, it is presumed to include only that species of beverages; and that, being taken in this sense, it will be sufficient, unless it is shown by evidence

that the particular liquor so described is nonalcoholic": Black, Intoxicating Liquors, § 17. Mr. McClain is of the same opinion (2 McClain, § 1220), and so are the editors of the Am. & Eng. Enc. of Law (volume 17, p. 201). The adjudications on both sides of this question are collated and cited by these authors, and it is sufficient to say we concur in the views expressed by them.

The reasons which impel us to this conclusion are so clearly and forcibly stated by Mr. Justice ORTON, in *Briffitt v. State*, 58 Wis. 39 (16 N. W. 39: 46 Am. Rep. 621), that we quote from his opinion at some length: "As long as laws for licensing the sale of intoxicating liquors have existed, brandy, whisky, gin, rum and other alcoholic liquids have been held to be intoxicating liquors *per se*; and why? Simply because it is within the common knowledge and ordinary understanding that they are intoxicating liquors. By this rule of common knowledge courts take judicial notice that certain things are verities, without proof; as, in *Chambers v. George*, 5 Litt. (Ky.) 335, the circulating medium in popular acceptance was held to mean 'currency of the state,' and in *Lampton v. Haggard*, 3 T. B. Mon. (Ky.) 149, the circulating medium was held to mean 'Kentucky currency,' and in *Jones v. Overstreet*, 4 T. B. Mon. (Ky.) 547, the word 'money' was held to mean paper currency. If a witness on the stand were asked whether whisky is intoxicating, he would be apt to smile as at a joke; and an intelligent witness, when asked the same question in relation to beer, might smile with equal reason. Words in contracts and laws are to be understood in their plain, ordinary and popular sense, unless they are technical, local or provincial, or their meaning is modified by the usage of trade: 1 Greenleaf, Evidence, § 278. When the general or primary meaning of a word is once established by such common usage and general acceptance, we do not require evidence of its meaning by the testimony of witnesses, but look for its definition in the dictionary. Whisky, according to Webster, is 'a spirit distilled from grain'; and beer, according to the same authority, is 'a fermented liquor made from any malted grain, with hops and other bitter flavoring matter.' It is true

that to a limited extent there are other kinds of beer, or of liquor called 'beer,' such as 'small beer,' 'spruce beer,' 'ginger beer,' etc.; but such definitions are placed as remote and special, and not primary or general.

So it may be said of other substances having a common name and meaning, such as milk or tea. Milk, according to Webster, is 'a white fluid secreted by female mammals for the nourishment of their young.' There are other kinds of milk, however, such as 'the white juice of plants,' which is the remote definition, or milk in the cocoanut, or that in the Milky Way. Tea is defined to be 'leaves of a shrub or small tree of the genus *Thea* or *Camellia*. The shrub is a native of China and Japan.' There are other kinds of tea, such as sage tea and camomile tea, etc. The latter are the restricted uses of the word. When asked to take a drink of milk, or a cup of tea, it would not be necessary to prove what is meant. Why is it more necessary to prove what is meant by a glass or drink of beer? When beer is called for at the bar, in a saloon or hotel, the bartender would know at once, from the common use of the word, that strong beer—a spirituous or intoxicating beer—was wanted; and, if any other kind was wanted, the word would be qualified, and the particular kind would be named, as root beer, or small beer, etc. When, therefore, the word 'beer' is used in a court by a witness, the court will take judicial notice that it means a malt and an intoxicating liquor, or such meaning will be a presumption of fact, and in the meaning of the word itself there will be *prima facie* proof that it is malt or intoxicating liquor that is meant. When the witnesses in this case testified that the defendant sold to them beer, the prosecution had sufficiently proved that he had sold to them a malt and intoxicating liquor, for both qualities are implied in the word 'beer.' This, as a logical conclusion and principle of law, would seem to be well established by common reason, and we think it would be difficult to find a single good reason against it." See, also, *United States v. Ducournal* (C. C.) 54 Fed. 138.

3. The instruction, that if defendant aided and assisted Baty in committing the crime of selling intoxicating liquor he was

guilty as charged in the indictment, was but stating a rule of statutory law, and was not error: B. & C. Comp. § 2153.

The judgment is affirmed.

AFFIRMED.

Decided 22 October, 1907.

ON MOTION FOR REHEARING.

91 Pac. 1081.

Opinion by MR. CHIEF JUSTICE BEAN.

It is claimed that the indictment in this case is insufficient because it is not averred that the liquor which defendant is charged with having sold was for beverage purposes. Section 15 of the local option law (Laws 1905, p. 48) provides that when an election held under the provision of the law has resulted in favor of prohibition, and the county court has made the order declaring the result, and the order of prohibition, any person who shall thereafter, within the prescribed bounds of prohibition, sell, exchange or give away, with the purpose of evading the provisions of the law, any intoxicating liquors, shall be subject to prosecution by information or indictment, etc. This is the penal section of the law, and one defining the crime. The indictment in question follows the language of the statute and it is the settled rule in this state that in indictments for misdemeanors created by statute it is sufficient to charge the offense in the words of the statute subject to the qualification that the crime must be set forth with such certainty as will apprise the accused of the offense imputed to him: *State v. Shaw*, 22 Or. 287 (29 Pac. 1028).

Exceptions and provisos in a criminal statute need not be negated in indictments unless they be descriptive of the offense or a necessary ingredient in its definition: *State v. Tamlar*, 19 Or. 528 (9 L. R. A. 853: 25 Pac. 71). The indictment in this case conformed to the rule of law above stated, and is, therefore, sufficient.

Petition denied.

AFFIRMED: REHEARING DENIED.

Argued 17 July, decided 20 August, 1907.

KAMM v. NORMAND.

61 Pac. 448; 11 L. R. A. (N. S.) 290.

WHAT STREAMS ARE NAVIGABLE—FLOATAGE OF LOGS.

1. In Oregon streams which in their natural state, whether with the usual volume of water or during ordinary recurring freshets, can be profitably used for purposes of commerce, are navigable and must be considered public highways for such purposes.

NAVIGABLE WATERS—INCREASING VOLUME BY DAMS—FLOODING*

2. A stream not a natural highway for commercial purposes cannot be made so by means of dams or causing sudden floods to the injury of riparian owners, though the use of streams may be improved by dikes or dams that do not materially interfere with the natural flow: *Union Power Co. v. Lichty*, 42 Or. 568, distinguished.

FLOATAGE OF LOGS—EVIDENCE.

3. The evidence shows that the North Fork of Klaskanie River, in its natural state, cannot be successfully used for floating logs to tide level, except at extreme high water, which usually lasts but a few hours.

FLOATABLE STREAM.

4. A stream that in its natural condition will not carry saw logs, except at times of very high water, which usually lasts but a few hours, and then only small and medium sized logs, is not a navigable stream or a highway for the purpose of floatage.

PUBLIC ADVANTAGE NOT A TEST OF NAVIGABILITY.

5. The navigable or floatable capacity of a stream cannot be determined or affected by its importance to public or private interests, and any rights claimed must be based on the actual condition of the stream or upon some constitutional proceeding, confiscation being a method of acquiring property not recognized by the courts of the United States.

From Clatsop: THOMAS A. McBRIDE, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a suit by Jacob Kamm to enjoin Alex and Fred Normand from using the North Fork of Klaskanie Creek for floating saw logs. The complaint alleges that the stream in question runs through plaintiff's land for a distance of about one-half mile, and that it is not navigable or floatable for rafts, logs, lumber or timber; that the defendants cut and put into the channel above plaintiff's premises large quantities of saw logs, and, in order to cause them to float down such stream, con-

*NOTE.—See notes in 41 L. R. A. 371-379, Right to Use Streams for Floating Logs; 41 L. R. A. 494-497, Liability for Injuries to Riparian Owner by Running Logs in Stream; 85 Am. St. Rep. 707-735, The Right of One Land Owner to Accelerate or Diminish the Flow of Water to or From the Lands of Another.

REPORTER.

structed a splash dam, whereby a large volume of water was accumulated and suddenly released and permitted to flow down the stream, forcing the logs on plaintiff's land in great numbers, cutting and breaking the banks, and otherwise damaging his premises; and that, unless enjoined and restrained, defendants will continue to so use the stream, to plaintiff's irreparable damage. Defendants admit, by their answer, that they are engaged in the logging business on the stream above the lands of plaintiff, and that they have constructed therein a splash dam for use in their logging operations. But they allege that the stream is navigable and suitable for the floatage of saw logs and other timber products where it runs through and for several miles above plaintiff's lands; that they are the owners of large tracts of valuable timber lands on the stream, and the only way the timber can be marketed is by floating it down such stream; that the stream is not navigable at all stages of the water, but has well-defined banks on either side; that in October, 1903, they constructed, at great expense, about two miles above the premises of plaintiff, a splash dam for the purpose of aiding and assisting the floatage of logs; that such dam is so constructed and operated as to be a benefit to plaintiff, since it is possible thereby to control the water and prevent it from overflowing the banks or reaching the height of ordinary freshets; and that logs floated down stream by use of the dam do less injury to plaintiff's premises than if floated without such dam. Upon a trial the court found the averments of the answer to be substantially true, and dismissed the suit, and plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *Dolph, Mallory, Simon & Gearin* and *Frank J. Taylor*, with oral arguments by *Mr. John M. Gearin* and *Mr. Taylor*.

For respondents there was a brief over the name of *Fulton Brothers*, with oral arguments by *Mr. George Clyde Fulton* and *Mr. Charles Erskine Scott Wood*.

Opinion by MR. CHIEF JUSTICE BEAN.

The questions for determination on this appeal are: (1) Whether the Klaskanie, where it flows through the lands of plaintiff, is a navigable or floatable stream; (2) to what extent, if any, the defendants may render it navigable or assist the navigability thereof by means of a splash dam.

1. The common law of England, that the only streams which are navigable are those in which the tide ebbs and flows, has never been adopted in this country. Rules which reason and convenience may have approved in reference to the streams of that country are wholly inapplicable to our waterways, natural resources and conditions, and it is now considered here that any stream which can be used in its natural state for commercial purposes is navigable. The existence of immense bodies of timber in Maine, Michigan and other states, which could be transported to market only by use of adjacent streams, influenced the courts to early hold that any stream which is capable in its natural condition of being commonly and generally used for floating saw logs at periods of high water is navigable or floatable for the transportation of the timber along its banks. This doctrine has been accepted and declared by this court, and the courts of this country generally, until now it may be regarded as settled that streams, which in their natural condition are useful for the transportation of saw logs during the whole or part of each year, are highways for that purpose: *Brown v. Chadbourne*, 31 Me. 9 (1 Am. Rep. 641); *Moore v. Sanborns*, 2 Mich. 520 (59 Am. Dec. 209); *Weise v. Smith*, 3 Or. 445 (8 Am. Rep. 621); *Shaw v. Oswego Iron Co.* 10 Or. 371 (45 Am. Rep. 146); *Haines v. Welch*, 14 Or. 319 (12 Pac. 502); *Haines v. Hall*, 17 Or. 165 (20 Pac. 831; 3 L. R. A. 609); *Nutter v. Gallagher*, 19 Or. 375 (24 Pac. 250); *Hallock v. Suitor*, 37 Or. 9 (60 Pac. 384); 27 Cyc. 1566; 21 Am. & Eng. Enc. Law (2 ed.), 428. But streams which are not of sufficient size and capacity to be profitably so used are wholly and absolutely private: *Munson v. Hungerford*, 6 Barb. 265; *Wadsworth v. Smith*, 11 Me. 278 (26 Am. Dec. 525). "The true test, therefore, to be applied in such cases," says the Supreme Court of

Maine, in *Brown v. Chadbourne*, 31 Me. 9 (1 Am. Rep. 641), "is whether a stream is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs." It is not necessary that the stream should be floatable at all seasons of the year. It is sufficient if it has that character at different periods, recurring with reasonable certainty, and continuing for a sufficient length of time to make it commercially profitable and beneficial to the general public. But every small creek or rivulet in which logs can be made to float for a few hours during a freshet is not a public highway. To make a stream a highway, it must at least be navigable or floatable in its natural state, at ordinary recurring winter freshets, long enough to make it useful for some purposes of trade or agriculture: *People ex rel. v. Elk River M. & L. Co.* 107 Cal. 221 (40 Pac. 531; 48 Am. St. Rep. 125); *Rowe v. Granite Bridge Corp.* 21 Pick. 344; *Morgan v. King*, 18 Barb. 277 (35 N. Y. 454; 91 Am. Dec. 67); *Banks v. Frazier*, 111 Ky. 909 (64 S. W. 983); *Commissioners of Burke County v. Catawba Lum. Co.* 115 N. C. 590 (20 S. E. 707, 847); *Lewis v. Coffee Co.* 77 Ala. 190 (54 Am. Rep. 55); *Hubbard v. Bell*, 54 Ill. 110 (5 Am. Rep. 98); *Carlson v. St. Louis River D. & I. Co.* 73 Minn. 128 (75 N. W. 1044; 72 Am. St. Rep. 610; 41 L. R. A. 371, note); 1 Farnham, Waters, 121; Gould, Waters, §§ 107-109.

"The true rule is," says the Supreme Court of New York, in *Morgan v. King*, 35 N. Y. 460 (91 Am. Dec. 67), "that the public have a right of way in every stream which is capable, in its natural state and its ordinary volume of water, of transporting, in a condition fit for market, the products of the forests or mines or of the tillage of the soil upon its banks. It is not essential to the right that the property to be transported should be carried in vessels, or in some other mode whereby it can be guided by the agency of man, provided it can ordinarily be carried safely without such guidance. Nor is it necessary that the stream should be capable of being thus navigated against its current, as well as in the direction of its current. If it is so far navigable or floatable, in its natural state and its ordinary ca-

capacity, as to be of public use in the transportation of property, the public claim to such use ought to be liberally supported. Nor is it essential to the easement that the capacity of the stream, as above defined, should be continuous or, in other words, that its ordinary state at all seasons of the year should be such as to make it navigable. If it is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement. These general views are in harmony with those maintained by the Supreme Court of Maine in *Brown v. Chadbourne*, 31 Me. 9 (1 Am. Rep. 641), and by the Supreme Court of Michigan, in *Moore v. Sanborne*, 1 Gibbs, 519." And this is the rule adopted in this state. In *Weise v. Smith*, 3 Or. 445 (8 Am. Rep. 621), it is said "that if a stream is in fact capable, in its natural condition, of being profitably used for any kind of navigation, its use is to that extent subjected to the general rules of law relating to navigation applicable to the circumstances of the case." And in *Haines v. Welch*, 14 Or. 319 (12 Pac. 502), Mr. Justice THAYER says: "If it (Anthony Creek) is capable of serving an important public use as a channel for commerce, it should be considered public; but if it is only a brook, although it might carry down saw logs for a few days during a freshet, it is not, therefore, a public highway." And in *Haines v. Hall*, 17 Or. 165 (3 L. R. A. 609; 20 Pac. 831), in speaking of the same stream, the court said: "Whether the creek in question is navigable or not for the purposes for which the appellant used it depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location is such and its length and capacity so limited that it will only accommodate a few persons, it cannot be considered a navigable stream for any purpose. It must be so situated as to have such length and capacity as will enable it to accommodate the public generally as a means of transportation."

The doctrine, then, which we derive from the authorities, is that a stream, to be a public highway for floatage, must be capable, in its natural condition and at the ordinary winter stages of water, of valuable public use, and, if not, it is private property. Ordinary stages of water or natural conditions, within this rule, do not mean a continuous state of floatage or an average volume of water. The term has reference to the natural flow of the water, and is applied to the stream in its natural condition, without the application of artificial means, and is used in contradistinction to extraordinary or unusual floods. That which occurs with reasonable certainty, periodically, can hardly be said to be unusual, and much less extraordinary, and may be properly characterized as ordinary. A stream, therefore, that is capable of floating logs, unaided by artificial means, during freshets or stages of water occurring with reasonable frequency and continuing long enough to make its use of commercial value, is a public highway for that purpose.

2. But a stream which is not such a highway cannot be made one by the use of dams or other artificial means, without first acquiring the rights of riparian proprietors: 1 Farnham, *Waters*, § 139. Nor can a stream, navigable in its natural condition at certain stages of the water, be made so at other times by artificial means, such as flooding and the like. No one has a right to store water, and then suddenly release the accumulation, and thus increase the natural volume of the stream, and overflow, injure or wash the adjoining banks, or otherwise interfere with the rights of riparian owners. The riparian proprietor is entitled to the enjoyment of the natural flow of the stream with no burden or hindrance imposed by artificial means: *Brewster v. Rogers Co.* 169 N. Y. 73 (62 N. E. 164: 58 L. R. A. 495); *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 336 (18 Am. Rep. 184); *Witheral v. Muskegon Booming Co.* 68 Mich. 48 (35 N. W. 758: 13 Am. St. Rep. 325); *Koopman v. Blodgett*, 70 Mich. 610 (38 N. W. 649: 14 Am. St. Rep. 527); *Matthews v. Belfast Mfg. Co.* 35 Wash. 662 (77 Pac. 1046); *Monroe Mill Co. v. Menzel*, 35 Wash. 487 (77 Pac. 813: 70 L. R. A. 272: 102 Am. St. Rep. 905); *Ford Lum. & Mfg. Co. v. Clark* (Ky.),

68 S. W. 443; *Kentucky Lum. Co. v. Miracle*, 101 Ky. 364 (41 S. W. 25); *De Camp v. Thomson*, 16 App. Div. 528 (44 N. Y. Supp. 1114).

Dams, dikes, embankments and the like may be constructed in or along floatable streams to facilitate their use (*Union Power Co. v. Lichty*, 42 Or. 563: 71 Pac. 1044), but not to the extent of injuring the riparian proprietors by retarding the flow of the water or sending it down in increased volumes to his injury or at times when the stream would not otherwise be navigable. And this rule is not changed by the fact that a stream cannot be successfully used for logging purposes without such artificial aids to navigation on the ground of necessity. In *Thunder Bay Booming Co. v. Speckly*, 31 Mich. 336 (18 Am. Rep. 184), and *Koopman v. Blodgett*, 70 Mich. 610 (14 Am. St. Rep. 527: 38 N. W. 649), the Supreme Court of Michigan had occasion to consider the right to make a stream which is navigable only at certain seasons of the year navigable at other times by impounding the water until a flow sufficient to float logs could be caused. In the former case, Mr. Justice COOLEY, after reviewing the Maine and Michigan cases, quoting with approval what is said to be the true rule by the New York Court of Appeals, noting the fact that all the cases carefully restrict within the bounds of capability for use in their ordinary and natural condition the public easement in streams navigable only at certain seasons of the year, and holding that a stream is navigable during the period the water in its natural condition is sufficient to permit of a public use, says: "During that time the public right of floatage and the private right of the riparian proprietors must each be exercised with due consideration for the other, and any injury which the latter receives in consequence of a proper use of the stream for floatage he must submit to as incident to his situation upon navigable waters: *Middleton v. Flat River Boom Co.* 27 Mich. 533. But at periods when there is no highway at all there is no ground for asserting a right to create a highway by means which appropriate or destroy private rights. The doctrine that this may be done without compensation to parties injured is at war with all our ideas of property and of

constitutional rights. The most that can be said of this stream, during the seasons of low water, is that it is capable of being made occasionally navigable by appropriating for the purpose the water to the natural flow of which the riparian proprietors are entitled. It is highly probable, in view of the large interests which are concerned in the floatage, that the general public good would be subserved by so doing; but this fact can have no bearing upon the legal question. It is often the case that the public good would be subserved by forcing a public way through private possessions; but it neither should be nor can be done under any circumstances without observing the only condition on which it can be permitted in constitutional government, namely, that the private proprietor be compensated for the value which he surrenders to the public. * * As was remarked in *Morgan v. King*, 35 N. Y. 460 (91 Am. Dec. 67), the question of public right in a case like this is to be decided without reference to the effect which artificial improvements have had in the navigable capacity of the river; in other words, the public right is measured by the capacity of the stream for valuable public use in its natural condition, and any attempt to create capacity at other times at the expense of private interests can be justified only on an assessment and payment of compensation." *Monroe Mill Co. v. Menzel*, 35 Wash. 487 (70 L. R. A. 272: 102 Am. St. Rep. 905: 77 Pac. 813), was a suit to enjoin the defendant from using the West Fork of Woods Creek for floating shingle bolts and from maintaining a splash dam thereon. The court held the stream to be navigable or floatable during the freshets which occur with periodic regularity in the spring and fall of each year, but that the detention of the water by means of a dam, and the release thereof at irregular intervals, causing the stream to overflow and washing the lands of the lower riparian proprietor, was such an interference with the natural flow of the water as would be enjoined. And in *Matthews v. Belfast Mfg. Co.* 35 Wash. 662 (77 Pac. 1046), it was held that the floating of logs down a stream, by means of dams and artificial freshets, at the time of the year when it is not navigable in its natural state, is an abuse of the right of

navigation for which an injunction will lie at the suit of riparian owners injured thereby, and that a private corporation which is not a boom company is not entitled to exercise the right of eminent domain against a lower riparian owner, for the purpose of facilitating the floating of logs down a stream by means of dams and artificial freshets, which damages the lower proprietor and interferes with his use of the stream. In fact, our attention has not been called to a case, nor have we been able to find one, sustaining the right to maintain dams or other artificial structures in a stream whereby the water is impounded and let down in such a head or volume as to make the stream navigable, when it would not otherwise be so, unless it be in the states of Maine, Wisconsin and Minnesota, where the construction of dams in floatable streams to facilitate their use is authorized by statute: *Brooks v. Cedar Brook, etc., Imp. Co.* 82 Me. 17 (19 Atl. 87: 7 L. R. A. 460: 17 Am. St. Rep. 459); *Kretzschmar v. Meehan*, 74 Minn. 211 (77 N. W. 41); *Field v. Apple River Log Driving Co.* 67 Wis. 569 (31 N. W. 17).

3. Having thus ascertained that a stream, to be navigable or floatable for saw logs, must be capable in its natural condition at ordinary recurring freshets of being successfully and profitably used for that purpose, and that a stream not navigable or floatable in its natural condition cannot be made so by artificial means, nor can the capacity of a navigable stream be increased by such means to the injury of a riparian proprietor without compensation, we are now prepared to consider the facts of the particular case before us and determine the respective rights of the parties litigant. The plaintiff is the owner of 480 acres of land, most of which is bottom or meadow land and has been extensively improved and used as such. Through this land, from the north and east, flows the North Fork of the Klaskanie, for a distance of about one-half mile, to a point a short distance west of plaintiff's land, where it joins another stream from the southeast, called the "South Fork" of the Klaskanie, and the two streams united flow to the west, forming the Klaskanie River. The tide ebbs and flows in the Klaskanie from its mouth

up to or about the confluence or junction of the two streams referred to, and is conceded by the plaintiff to be navigable to that point. From the junction of the two streams towards its source, the North Fork is a shallow tortuous stream, from 40 to 60 feet wide. For about half the distance through plaintiff's land it consists of riffles or shoals, and the water is but a few inches deep in the summer time, and from one and one-half to two feet deep during the ordinary winter freshets. At places the banks on one side are from four to six feet high; the opposite bank gradually sloping back to the meadow land. The soil is alluvial, and easily eroded in time of high water, and plaintiff has expended large sums of money in constructing embankments and other improvements to preserve the banks. In the fall of 1903 the defendants went upon the stream, about two miles above plaintiff's land, and constructed a dam 28 feet high for use in their logging operations, which dam is provided with four gates—three trip gates, each eight feet wide and 16 feet high, and one slide gate, 6 feet wide and 24 feet high. By means of this dam the defendants are enabled to impound a large volume of water, which they suddenly release and allow to flow down the channel to suit their convenience.

Many witnesses were called and testified in behalf of both parties as to the character and capacity of the stream. They differ as to whether logs can be floated down it without the aid of dams. The witnesses for plaintiff, most of whom are farmers or landowners along the stream or in the vicinity, all concur in opinion that it cannot be so used; while the witnesses for defendants, most of whom are loggers or mill men, are equally positive that it can. But, while the witnesses differ in their opinions, there is no substantial conflict in the facts as testified to by them. They all agree that the stream is not floatable except in times of winter freshets, and that such freshets do not ordinarily occur more than three or four times a year, and continue but a few hours at a time. Christian Peterson, who was plaintiff's foreman, and lived upon his farm for 24 years prior to 1902, testified that during the ordinary winter freshets the water was from one and one-half to two feet deep in the riffles

and shoal places, and would not float logs, but there might be two or three days in the year during which small logs would float down the stream; that the freshets would continue sometimes a couple of hours, and sometimes a half a day, and the water would fall as rapidly as it came up; that some years ago Gilliam and Warnstaff put 80,000 or 90,000 feet of logs in the stream above plaintiff's land, and that only five or six of them had come out, and the remainder were scattered along the banks at the time he left the farm in 1902. John Leahy, who for 20 years has lived about one and one-half miles above plaintiff's premises, testified that the water is from one and one-half to two feet deep in the winter, except in case of unusually high water, which may occur once or twice a year and continue for a few hours at a time; that logs could not be floated at ordinary high water, but they would stop on the bars and along the banks; that more damage was done to the banks during the winter of 1903 by the operation of defendants' splash dam than in the entire 20 years he had lived on the stream, and that logs had been left higher on the banks than by the winter floods; that within three weeks prior to the trial in July, 1904, defendants had flushed down the stream, by means of their dam, about 100,000 feet of logs, which had lodged above his place, and there was great danger of their carrying away his house.

James Leahy, who had lived on the stream above plaintiff's place for more than 20 years, testified that during the winter of 1903 and 1904 there was but one freshet sufficient to float logs, and then only small ones, and that it did not continue for more than three hours; that some years there would be three or four freshets, depending upon the rainfall, but they would only continue two or three hours; that the running of logs by defendants during the winter of 1903 and 1904 caused more damage than the natural wash of the stream for the previous 20 years. Michael Leahy and Charles Gilliam, who live on the stream, say that the water is from two and one-half to three feet deep during the ordinary winter freshets, and not sufficient to float any but small saw logs. Gilliam testified that some 12 or 15 years ago he put 137 logs in the stream and got one out the first

year, and that six or seven of the smaller ones came down to plaintiff's place; that he tried to get the logs out, but could not do so for want of water, and had to abandon the enterprise; that logs would go down from a quarter to a half mile during a freshet, and then the water would recede and leave them in the channels of the stream or along the banks; that some of the logs were still in the stream, and others came out during the winter of 1903, when defendants were operating their splash dam; that logs which had laid in the stream for 15 or 16 years and were not carried out by ordinary winter freshets were floated out by water from the splash dam. Stephen Thies, who had charge of plaintiff's farm from April, 1902, to date of trial in July, 1904, testified that during the winter of 1902 and 1903 there were two or three freshets, one of which was extremely high, and continued from 10 to 12 hours; that during ordinary winter freshets the water was from two to three feet deep in shoal places, and not that during the winter of 1903 and 1904; that in June, 1904, the defendants were running logs down the stream by use of their splash dam; that they opened the dam and allowed the accumulated water to come down the stream, bringing logs with it, perhaps 20 times during the winter; that they were not able by this means to get all the logs out, but many of them were left on the banks and lowland along the stream, and there has been no time since defendants commenced the operation of their dam that plaintiff's land has been free of logs. Frank Buxton, who was employed on plaintiff's farm, testified that the stream was flushed by defendants during the winter of 1903 and 1904 from 25 to 30 times, raising the water two or three feet above its natural stage; that there was a rise of water during the winter from natural causes sufficient to float small logs.

Most of the witnesses for defendants do not live on the stream and have no actual knowledge of its conditions, but testified as to their opinion from an examination of the stream and their general knowledge of the climatic conditions of the surrounding country and its waterways. They generally agree that not more than from two to five freshets, sufficient to float logs, may reasonably be expected in the streams of that vicinity each year,

continuing, as a rule, from 6 to 12 hours, but there were no such freshets during the winter of 1903 and 1904. Wallace and J. C. Dunkin, who were employed by defendants, testified that there was not more than one logging freshet during the winter of 1903 and 1904, and that the splash dam operated by defendants would raise the water as high as an ordinary freshet. Fred Normand, one of the defendants, says there are ordinarily from three to five freshets a year, depending upon the amount of rainfall, and last from three to five hours; that defendants' splash dam was constructed in the fall of 1903, and there was once during the succeeding winter that logs would float down the stream in its natural stage; that defendants were careful not to open the dam so as to overflow the banks of the stream and carry the logs out on the meadow, nor in the summer time, "because we do not want to overflow the bottom land." Alex Normand, the other defendant, said that four or five freshets may be reasonably expected each year, and they usually last from 5 to 6 and 10 to 12 hours, and that, by assisting them, "we can run logs for a day and a half or two days"; that their dam will raise the water in the stream about four feet, when a full head is turned down, but hardly as high as an ordinary freshet; that defendants used the dam for scattering logs along the stream, and "to assist them on down, so we can market them and not have to wait for freshets, as we would otherwise have to do"; that during the winter of 1903 and 1904 they were able, by use of their dam, to float down to tide water from 1,700,000 to 2,000,000 feet of logs, for about four miles, which they expected to splash out during the succeeding winter.

4. We have made this extended reference to the testimony because whether a given stream is, in law, navigable or floatable, depends upon the facts, and a decision in one case cannot be regarded as a precedent in another, unless the facts are the same. From the testimony of the witnesses, both for plaintiff and defendants, it is apparent, we think, that the Klaskanie, where it flows through plaintiff's land, is not, in its natural condition, floatable for logs, because it is not capable of serving any important public use. Logs cannot be floated therein except,

perhaps, at extreme high water continuing for a few hours at a time, and then only small logs. It would be going beyond any precedent of which we have knowledge to hold that such a stream is a public highway; and, since it is not such highway in its natural condition, it cannot be made so by means of a splash dam or other artificial structures, without first acquiring the rights of the riparian proprietors.

5. It is suggested that in view of the great lumber interests in the state, the public good would be subserved by holding that streams like the North Fork of the Klaskanie are public highways for the floating of saw logs; but this argument can have no bearing whatever upon the question. The magnitude or importance of any business or industry will not justify the slightest encroachment upon the rights of the citizen, and, unless a stream is in fact navigable or floatable, it cannot be taken or used without the consent of the owner, except by due process of law, however beneficial it might be to private interest or the public itself. It is often the case that the public good would be subserved by taking one man's property for the benefit of the community; but as already quoted from Judge COOLEY, "it neither should be nor can be done under any circumstances without observing the only condition on which it can be permitted in constitutional government, namely, that the private proprietor be compensated for the value which he surrenders to the public."

The decree will be reversed, and one entered here for plaintiff.

REVERSED.

Argued 18 June, decided 16 July, 1907.

PACIFIC MILL CO. v. INMAN.

90 Pac. 1099.

PLEADING—AMENDMENT—DISCRETION OF COURT.

1. The allowance of amendments to pleadings is largely within the discretion of the trial court.

AMENDMENTS—SUFFICIENCY OF NOT A TEST FOR FILING.

2. The right to file an amended pleading does not depend on whether it is good as against a demurrer or a motion to strike, for if it sets up a new defense or cause of action, or a former one more completely, or remedies any other defects, it is sufficient, and the amendment on being allowed is subject to the same tests as an original pleading.

TESTING PLEADINGS BY AFFIDAVIT.

3. Under Section 76, B. & C. Comp., providing that sham answers may be stricken on motion, etc., the court will not determine on affidavits whether a pleading is sham, where it is verified.

CONTINUANCE—DISCRETION OF COURT.

4. The granting or refusing an application for continuance is discretionary with the trial court.

APPEAL FROM ORDER GRANTING CONTINUANCE.

5. Rulings on applications for continuances do not involve the merits, or necessarily affect the judgment, within Section 557, B. & C. Comp., providing that on an appeal the court will review only such interlocutory orders as involve the merits or necessarily affect the judgment.

AMENDMENTS—CONTINUANCES—CONDITIONS ON GRANTING.

6. Where a party has not incurred expense in preparation for trial, the court in granting a continuance on the motion of the adverse party may determine in its discretion whether terms shall be imposed.

APPEAL—LAW OF THE CASE.

7. Where, on the second trial of a case, the issues have been changed, and much evidence admitted on the former trial has been excluded on the second, the decision of the supreme court on appeal from the judgment on the former trial is not the law of the case on a second appeal: *Stager v. Troy Laundry Co.* 41 Or. 141, distinguished.

CONTRACT—ACTION FOR BREACH—ISSUE—ABATEMENT.

8. Where, in an action for breach of a contract whereby plaintiff agreed to increase its capital stock and defendant agreed to buy a part thereof, the complaint alleges the issuance of the increased stock and the tender of a certificate of a part thereof to defendant, and the answer denies the allegations, the question of the validity of the increase of the stock is one of the very things in dispute and not a matter to be pleaded in abatement.

CORPORATIONS—UNAUTHORIZED INCREASE OF STOCK—RATIFICATION.

9. Where directors of a corporation have attempted without authority to increase the capital stock, or where the stockholders in an irregular manner have attempted to do so, such action may be ratified by the corporation.

CONTRACTS—APPLICATION OF DOCTRINE OF RATIFICATION.

10. The doctrine of ratification operates only against the principal to a contract by way of estoppel, and applies solely to contracts that have been executed by the party asserting ratification.

CONTRACTS—CREATING A LIABILITY BY RATIFICATION.

11. A party to an executory contract cannot by a ratification of a void act create a liability in its favor against the other party to the contract, since before the ratification the contract was not mutual.

PLEADING—MOTION FOR JUDGMENT.

12. Where a material issue is tendered by a denial of the allegations of the complaint, a motion for judgment in favor of plaintiff is properly denied.

APPEAL—QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.

13. Where, in an action for breach of contract, the court has properly granted a motion for judgment of nonsuit, questions as to the admissibility of evidence touching claims for damages are immaterial.

From Multnomah: **JOHN B. CLELAND, Judge.**

Statement by MR. JUSTICE EAKIN.

This is the second appeal in this action, the opinion on the former hearing being reported in 46 Or. 352 (80 Pac. 424). The action was commenced April 10, 1902, by the Pacific Mill Co. Ltd., against Inman, Poulsen & Co. to recover damages for the breach of a contract. Plaintiff is a Hawaiian corporation and defendant an Oregon corporation engaged in the manufacture of lumber. On August 3, 1901, defendant entered into a contract with plaintiff, whereby plaintiff agreed to increase its capital stock from \$12,000 to \$50,000, and to secure subscriptions for \$23,000 of such increase, to be paid in four months, and defendant undertook to purchase \$15,000 worth of such increase, to be paid in lumber, plaintiff thereafter to deal in lumber in Hawaii to be furnished by defendant. The said contract is set out in full in the opinion in the former case, and it is not necessary for this decision to set it out at length. Defendant refused to ship lumber to plaintiff, or to pay for said stock, and plaintiff seeks to recover for the breach of such contract, and alleges various items of damage. On September 18, 1905, defendant asked permission to file an amended answer, which on October 27th was granted, and on November 1, 1905, defendant made an application for a continuance of the trial of said case, which was granted, and it was set for January 15, 1906. Thereafter, on February 24, 1906, defendant again made application for a continuance, which was granted, and the case set for June 7, 1906, and the trial was commenced on that date. At the close of plaintiff's testimony defendant moved the court for nonsuit, upon the ground that plaintiff had failed to prove that it had increased its capital stock from \$12,000 to \$50,000, as required by the terms of the contract, which motion was allowed. Plaintiff at the same time moved for judgment in its favor upon the pleadings, which motion was denied. No evidence was offered by plaintiff at the trial with a view to directly prove the action of plaintiff in increasing its capital stock, or a formal ratification thereof, and that question is left to such inferences as may be drawn from the fact of an

overissue of stock and the action of the corporate officers in receiving payments upon the sale thereof. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Ralph Rolofson Duniway*.

For respondent there was a brief over the names of *Cake & Cake* and *John T. McKee*, with an oral argument by *Mr. Harry M. Cake*.

Opinion by MR. JUSTICE EAKIN.

1. Plaintiff assigns as error the ruling of the court below in granting defendant permission to amend its answer. The allowance of amendments is largely in the discretion of the trial court, and we find nothing in this case that indicates any abuse of discretion, nor does it appear that plaintiff was prejudiced thereby.

2. The right to file an amended pleading does not depend upon whether it is wholly invulnerable to a demurrer or motion to strike out. If it sets up a new defense or a former one more complete, or remedies any other defect, it is sufficient, and this will be determined by an inspection of the pleadings. In permitting an amendment the court does not so pass on its sufficiency as to preclude a demurrer or motion to test its form or substance, but it is subject to such tests, thereafter, the same as an original pleading.

3. Neither will the court determine upon affidavit whether such amended pleading is sham. To try out upon affidavit the truth of the amended pleading would be to usurp the province of the jury, and in fact determine the merits by affidavit. Whether, under Section 76, B. & C. Comp., a pleading is sham, must be determined from the pleading itself, or from the whole record: *Greenbaum v. Turrill*, 57 Cal. 285. The authorities are not uniform upon this question, but we think that under a statute like ours, and where the pleading is verified by affidavit, the safer and better rule is that the truth or falsity of the amended pleading must be determined from the record and cannot be tried out upon affidavit when making up the

issues: *Schnitzer v. Schaeffer*, 10 App. Div. 173 (41 N. Y. Supp. 908); *Pfister v. Wells*, 92 Wis. 171 (65 N. W. 1041); *Upton v. Kennedy*, 36 Neb. 66 (53 N. W. 1042); *Loranger v. Big Mo. Min. Co.* 6 S. D. 478 (61 N. W. 686); *Gjerstadengen v. Hartzell*, 8 N. D. 424 (79 N. W. 872).

4. Plaintiff assigns as error the ruling of the court in granting two continuances upon the application of defendant. The granting of such applications is also in the discretion of the court, especially if the adverse party is not prejudiced thereby, and it is difficult to understand what advantage will result to the plaintiff if this court should reverse the ruling of the trial court thereon.

5. However, Section 557, B. & C. Comp., provides that upon the appeal the court will only review such interlocutory orders of the lower court as involve the merits or necessarily affect the judgment. The ruling upon these motions did not involve the merits or in any manner affect the judgment, and the reversal thereof could not change the status of the case in the lower court when remanded.

6. Sometimes it is a matter of right to an adversary that the court should impose terms as a condition upon which to grant the filing of an amended pleading or a continuance, but nothing is shown here to indicate that plaintiff had incurred expense in preparation for the trial, such as the attendance of witnesses, etc., thus making compensation important. It is a matter of discretion whether the trial court should impose reasonable terms in the absence of such expense. Terms were imposed on the second application. We think the action of the lower court thereon was not reversible error.

7. As to the motion for nonsuit, counsel for plaintiff insists that the question of the *prima facie* sufficiency of plaintiff's evidence is *res judicata*, a former nonsuit having been granted, and the judgment thereon reversed on appeal: 46 Or. 352 (80 Pac. 424). But for the purpose of this argument counsel assumes that it is disclosed in this record that the evidence on this trial is the same as on the former, which assumption

is not justified by the record. At the former hearing in this court it was conceded that plaintiff introduced evidence tending to prove all the allegations of the complaint, except as to the sufficiency of the stock subscription, and that was the only ground assigned for the nonsuit, while on this trial it is claimed there was no evidence as to the increase of the capital stock, and that is the assignment for nonsuit now: *Palmer v. Publishing Co.* 90 Cal. 168 (27 Pac. 21). The issues have been changed by an amended answer. Much evidence that was admitted in the former trial was excluded in this, and the court cannot say that the issues or the evidence are the same as on the former trial. In the case of *Stager v. Troy Laundry Co.* 41 Or. 141 (68 Pac. 405), cited upon this point by plaintiff, it was conceded at the hearing that the evidence was the same in both cases, and therefore is not applicable.

8. Counsel for plaintiff also insists that the question of the increase of the capital stock is not an issue in this case; but it is alleged in the complaint as part performance of the contract, and the certificates are tendered, and such increase is a necessary condition of plaintiff's right to recover the \$15,000 as the price of the stock, and this is specifically denied by the answer, thus putting plaintiff upon proof thereof. And the question of the legality of the increase of the capital stock is not matter in abatement, as claimed by the plaintiff. By the contract plaintiff agreed to increase the capital stock, and defendant agreed to purchase \$15,000 worth of such increase, and this suit is brought to recover that price or damages for the refusal to purchase, and defendant's liability depends on whether plaintiff at that time had 300 shares to deliver and the whole increase valid. It is the very gist of the cause of action: *Finley Shoe & L. Co. v. Kurtz*, 34 Mich. 89.

9. There is no showing in the record of any action by plaintiff with a view to increase its capital stock, and to establish such increase plaintiff relies entirely upon a subsequent ratification by the company of an overissue of such stock by officers of plaintiff. No formal action was taken for that purpose, but

plaintiff depends wholly upon acquiescence in such overissue of stock and in the fact that its officers received payment on subscription to such overissue as disclosed in the evidence offered to establish the subscription of the \$23,000 worth of new stock. Before there can be a ratification of the increase of capital stock it must appear that some effort was made to so increase it, and if such effort was made by the directors without authority or by the stockholders in an irregular manner, or in some way an increase was declared, then ratification may be shown against the company: 4 Thompson, Corporations, § 5293. But the only evidence of such increase here was an overissue of stock by the president and secretary, and it would appear that there was nothing to ratify. What might be the remedy of a purchaser for value of such overissue is not involved here.

10. However, a ratification operates by estoppel against the principal and can only affect executed contracts: 4 Thompson, Corporations, §§ 5285, 5289. That is, where the other party has performed, the ratification may be taken advantage of by him against the corporation: *Pixley v. Western P. R. Co.* 33 Cal. 183 (91 Am. Dec. 623); *Foulke v. Southern Pac. R. Co.* 51 Cal. 365; 10 Cyc. 1083. To say that a subsequent ratification is equally effective as an original authority, in so far as it might be inferred thereby that it binds both parties, is inaccurate. It is as effective against the principal as an original authority; but there must be maintained a distinction between cases where such ratification is relied upon as a basis of a demand in favor of the principal and one against him: 2 Herman, Estoppel & Res. Jud. § 1213.

11. Although the other party to a contract may rely upon a ratification of an unauthorized act of an agent, on the theory of estoppel, the principal being estopped to deny that there was authority for the act of the agent, yet the principal cannot rely upon such ratification to charge the other party upon a contract that was not before binding upon the principal: *Newton v. Bronson*, 13 N. Y. 587 (67 Am. Dec. 89). In this case

the contract is wholly executory on the part of both the contracting parties. Defendant has received nothing and has done nothing that estops it, and plaintiff cannot plead ratification of a void act to create a liability in its own favor: *Mechem, Agency*, §§ 167, 179; *Atlee v. Bartholomew*, 69 Wis. 43 (33 N. W. 110: 5 Am. St. Rep. 103); *Townsend v. Corning*, 23 Wend. 435; *Waldo v. Chicago*, 14 Wis. 630. Before the other party can be bound upon an executory contract requiring the ratification of the principal he must have agreed to it thereafter. In other words, before the ratification the contract was not mutual, and the principal cannot, thereafter, give it validity by ratification without the consent of the other party. Therefore, in this case, plaintiff can claim nothing by virtue of a ratification, if one were proven, and there being no evidence of a valid increase of capital stock, plaintiff is not in a position to claim from defendant the value of it or damages for refusal to purchase.

Neither is the existence of a ratification of the increase of the capital stock at the time of defendant's alleged breach of contract here for adjudication. It would have acted at its peril to have paid its money for stock, relying upon its ability to prove a ratification thereafter. In other words, it would have courted a law suit to have done so, and a decision in a suit by it against plaintiff to establish that fact would only affect the particular stock involved and not the actual increase as such. That could only be determined in a suit for that purpose in a court of competent jurisdiction, when all the parties to be affected by it are in court. An adjudication in this case would not be binding upon the other alleged purchasers of such stock, nor upon the plaintiff as to other stock, and the validity of the whole of the \$35,000 increase is essential to plaintiff's recovery here.

12. The fact that a material issue is tendered by the denial of the allegation of the increase of plaintiff's capital stock disposes also of the motion for judgment on the pleadings adversely to plaintiff: *Finley Shoe & L. Co. v. Kurtz*, 34 Mich. 89.

13. This results in affirming the action of the court in granting the motion for judgment of nonsuit, and therefore it is unnecessary to pass upon the questions raised on the admissibility of evidence touching claims for damages.

The judgment of the lower court is affirmed. **AFFIRMED.**

Argued 8 July, decided 22 July, 1907.

RIDINGS v. MARION COUNTY.

91 Pac. 22.

PLEADING—AMENDING COMPLAINT—DISCRETION.

1. Under Section 102, B. & C. Comp., providing for amendments to pleadings, where the complaint in an action for injuries sustained on a bridge said to have been defective, showed that the plaintiff had not been informed of the condition of the structure, but did not show that he was ignorant of its condition, discretion was well exercised in allowing an amendment accordingly, where it did not appear that defendant was misled or injured.

SAME—EFFECT OF OBJECTION UNDER ORIGINAL COMPLAINT.

2. The fact that under the original complaint objection was made to the admission of testimony as to plaintiff's lack of knowledge of the defect in the bridge does not deprive the court of power to allow the amendment: *Mendenhall v. Harrisburg Water Co.* 37 Or. 28, distinguished and explained.

HIGHWAYS—ESTABLISHMENT BY USER—PUBLIC IMPROVEMENT.

3. If a highway has been generally traveled, and has been improved by the public authorities as a county road for a period of ten years or more, it is a legal county road.

BRIDGES—AUTHORITY TO CONSTRUCT AND REPAIR.

4. In an action for personal injuries sustained because of a defective bridge, testimony to show that the road and bridge had been kept in repair by the road supervisor under the direction of the county court is admissible without showing an order of the court authorizing or directing him to keep them in repair, or that no record of such authority had been made, since under the statute the road supervisor is an officer of the county appointed by the county court, which has charge of highways and bridges, and it is his duty to keep the roads in repair.

BRIDGES—USE FOR TRAVEL—CONTRIBUTORY NEGLIGENCE.

5. Where a county constructs or maintains a bridge for use by the public, a traveler may assume, in the absence of information to the contrary, that he may safely travel over any portion of the bridge, and in doing so he is not guilty of contributory negligence.

TRIAL—INSTRUCTIONS—SUFFICIENCY OF AS A WHOLE.

6. Where an instruction as a whole clearly states the law as to the measure of damages for personal injury, and the jury could not have been misled thereby, it will not be held insufficient on account of the wording of a portion thereof.

From Clackamas: THOMAS A. McBRIDE, Judge.

Action for personal injuries by H. P. Ridings against Marion County, removed for trial to Clackamas County. Plaintiff recovered a judgment of \$1,250, from which defendant appealed.

AFFIRMED.

For appellant there was a brief over the names of *John H. McNary*, District Attorney; *C. L. McNary* and *Carson & Cannon*, with an oral argument by *Mr. Charles Linza McNary*.

For respondent there was a brief over the names of *Charles D. Latourette*, *George Greenwood Bingham* and *E. P. Morcom*, with oral arguments by *Mr. Latourette* and *Mr. Bingham*.

Opinion by MR. CHIEF JUSTICE BEAN.

This is an action to recover damages for an injury received by plaintiff, while traveling on a county road leading from Woodburn to Monitor in defendant county, in consequence of a defect in a bridge over Pudding River on such road. After alleging that the road upon which he was traveling at the time of his injury was a legal county road, and that the bridge thereon was and had been for a long time prior to the accident out of repair and in a dangerous and defective condition, and known to the county authorities to be so, plaintiff avers that, "while he was lawfully traveling upon said highway and not having been warned of the defects in said legal county road, or in said bridge, or of the dangerous condition of the same, the horse upon which plaintiff was riding stepped through a hole in said bridge and plaintiff, by reason thereof, was thrown violently to the flooring of said bridge" and severely and permanently injured in his right arm. The answer denies all the material allegations of the complaint. Upon the issues thus joined, the cause was tried before the court and a jury, resulting in a verdict in favor of plaintiff. From the judgment entered therein defendant appeals, assigning error in the admission of testimony and in the giving of instructions. The several assignments of error will be considered in the order in which they were presented.

1. Plaintiff, as a witness, testified that after dark on the

evening of October 30, 1904, as he was traveling over the bridge in question going towards Woodburn, he met a buggy and team, and in turning out to allow them to pass, his horse stepped in a hole in the bridge and he was thrown violently to the floor thereof and severely injured. He was thereupon asked by his counsel whether he had any previous knowledge of the existence of the hole in the bridge. To this question an objection was interposed and sustained, because a want of such knowledge was not alleged in the complaint, but simply that plaintiff had not been warned of the defect. Plaintiff then moved for permission to amend his complaint by inserting the words "and without knowledge." The motion was allowed, and this ruling is assigned as error. The omission of an averment in the complaint that plaintiff was without knowledge of the defect in the highway was no doubt due to the fact that the pleader had forgotten that Section 4781, B. & C. Comp., giving a right of action to one injured while lawfully traveling on a county road, had been amended or changed by the act of 1903: Laws 1903, pp. 262, 280, § 59. But as the amendment did not change the cause of action, and it does not appear that the defendant was in any way misled to its prejudice thereby, it was properly allowed. The statute authorizes the court to allow a pleading to be amended at any time before the cause is submitted by correcting a mistake therein, or, when the amendment does not substantially change the cause of action or defense, by conforming the pleading to the facts proved: Section 102, B. & C. Comp. The power thus conferred upon trial courts has always been and should be liberally exercised in furtherance of justice, for, as said by Mr. Chief Justice STRAHAN, in *Baldock v. Atwood*, 21 Or. 73 (26 Pac. 1058): "Nothing is ever gained by turning a party out of court or compelling him to take a nonsuit on account of some defect in his pleading not discovered perhaps until the progress of the case, when an amendment could supply the defect and the action or suit be brought to an early determination." The allowance of such an amendment rests in the discretion of the trial court, and its ruling

will not be disturbed on appeal except in case of manifest abuse of such discretion. This rule has been so often announced and applied by this court that it is unnecessary to cite authorities in its support.

2. The fact that objection was made to the admission of the testimony did not deprive the court of the power to allow the amendment: *Wild v. Oregon Short Line Ry. Co.* 21 Or. 159 (27 Pac. 954); *Koshland v. Fire Association*, 31 Or. 362 (49 Pac. 865); *Farmers' Bank v. Saling*, 33 Or. 394 (54 Pac. 190); *York v. Nash*, 42 Or. 321 (71 Pac. 59). The case of *Mendenhall v. Harrisburg Water Co.* 27 Or. 38 (39 Pac. 399) when rightfully understood, is not to the contrary. It was so explained in *Farmers' Bank v. Saling*, 33 Or. 394 (54 Pac. 190).

3. No evidence was admitted on the trial to show that the highway in question had been regularly laid out and established by the public authorities, but plaintiff was permitted to give evidence tending to show that it had been used and traveled by the public as a highway for more than 10 years prior to the time of plaintiff's injury, and that it had been recognized as such by the county authorities. The court instructed the jury that if the road had been traveled, used, improved and worked by the public as a county road for a period of 10 years and more prior to the accident, it was, for the purpose of this action, a legal county road. There was no error in the admission of this testimony, or in so instructing the jury. In this State a highway may be established by adverse user, and, "where the length of time of such use by the public has been greater than the period prescribed by the statute of limitations for the recovery of real property, that will be regarded as sufficient evidence of the existence of a highway independently of any supposed dedication": *Douglas County Road Co. v. Abraham*, 5 Or. 318. To the same effect is *Bayard v. Standard Oil Co.* 38 Or. 438 (63 Pac. 614).

4. Objection was made to the admission of testimony that the road and bridge in question for more than 10 years had been kept in repair by the road supervisor under the direction

of the county court without showing an order of the court authorizing or directing him to do so, or that no record of such authority had been made. But we think the evidence was competent. The road supervisor is an officer of the county appointed by the court (Laws 1903, pp. 262, 282, § 68), and it is his duty to open or cause to be opened all county roads in his district and keep the same in good repair. For that purpose he is authorized to purchase, with any available funds on his hands, timber, plank or other necessary material: Laws 1903, pp. 262, 271, § 28. In so acting he is the agent or representative of the county (*McCalla v. Multnomah County*, 3 Or. 424), and it is not necessary to show a formal order of the court authorizing or instructing him as to when or how he shall perform his duty, or that no such order was entered of record. If a highway is opened and kept in repair by the proper county authorities, it is evidence tending to show that it is a county road, and it is not incumbent on one who is injured by the negligence of such authorities to show that the work was authorized by some formal order of the county authorities or that it was done by or under their direction.

5. It appears that the bridge in question, which was about 16 feet wide, had been replanked or "half-soled" for about 10 feet in the center thereof a short time before the accident to plaintiff. The defendant requested the court to instruct the jury that, as plaintiff failed to show that the parties in charge of the buggy which he met on the bridge refused to give him half the road, it must be presumed that they did so, and as a consequence that he was guilty of contributory negligence in guiding his horse off of the replanking and into the hole in the bridge. But plaintiff had a right to assume, in the absence of knowledge to the contrary, that the bridge was safe for travel its full width, and could not be charged with contributory negligence in going off of the half-soled portion thereof, whether he was compelled to do so or not. Where a county constructs or maintains a bridge for use by the public, a traveler has a right to assume, in absence of information to the contrary, that

he may safely travel over any portion of such bridge and he is not guilty of contributory negligence in doing so.

6. The defense excepted to the following language in the court's charge to the jury:

"In this case you cannot find for over \$2,000 in damages, and the compensation you are to give is for whatever bodily injury you say he has suffered, you find that he has suffered, if he has suffered any, or is unable to perform any work as a mail contractor or any work whatever, whatever lessened capacity for work he has, if any. Your verdict should be for such sum as in your judgment would compensate him for the injury and suffering he has sustained, if you find he is entitled to compensation at all. If you find he is entitled to compensation at all for his reduced capacity for work and his disablement, if you find he is disabled, or incapacitated for labor in any degree whatever you find he is incapacitated, you will fix that in the measure of damages."

The objection is that the language excepted to is unintelligible and it cannot be determined therefrom whether the court intended to confine the recovery of damages to the physical suffering of the plaintiff, or whether it intended to allow the jury to include damages for his mental suffering. But it is only a part of the instructions on the measure of damages. The remainder of the charge on that subject is as follows:

"There is no exact measure for bodily pain and suffering in these matters. You cannot say so much pain is worth so many dollars; and such another amount of pain is worth so much more. You cannot estimate it with the accuracy that you could sum up an account. But it is left, to a very great extent, to the sound discretion of the jury, under the law. There is nothing to be given here on account of sympathy you may feel for this man. Whenever you begin to consider a verdict on the ground of sympathy, it is your duty to put your hands in your own pockets and contribute whatever amount you feel sympathy ought, and not to take it from the pockets of the citizens of Marion County. But whatever is fair compensation, if you think he has shown the right to recover at all, whatever is fair and just compensation inside of \$2,000, you should give him; on one hand not wanting to give him any less than fair compensation, and on the other hand without any desire to shovel money out on the ground of sympathy,

but just what justice and fairness would compensate him for whatever injury he has sustained at this place, if he has sustained any."

When taken as a whole, the instruction, we think, clearly stated the law, and the jury could not have been misled thereby. It confined the recovery to compensation for the physical injury plaintiff sustained.

The judgment is affirmed.

AFFIRMED.

Decided 30 July, 1907.

SEARS v. DUNBAR.

91 Pac. 145.

RIGHT TO APPEAL.

1. The right to appeal a case is one conferred by statute, and is limited to cases falling within the terms of the act.

AMENDING PLEADINGS—EFFECT OF ERROR OF DISCRETION.

2. The granting of leave to amend a pleading is discretionary, and the order is valid and binding though erroneously granted.

MOTION TO DISMISS APPEAL—CONSIDERING MERITS.

3. In passing on a motion to dismiss an appeal the court ought not to consider the merits of the case.

APPEAL—ILLUSTRATION OF ORDER NOT FINAL.

4. Under Section 547, B. & C. Comp., as amended by Laws, 1907, p. 313, c. 162, limiting appeals to orders affecting substantial rights and in effect determining suits, etc., an order, in a suit by a taxpayer against a former public officer to require him to account for moneys received in his official capacity during his term of office, denying defendant's motion to dismiss after a demurrer had been sustained to the complaint for plaintiff's incapacity to sue, and granting substitution of the State as plaintiff, is not appealable; the sustaining of the demurrer and the substitution not being final as to the suit.

From Marion: WILLIAM GALLOWAY, Judge.

Statement by MR. JUSTICE EAKIN.

This is a motion to dismiss an appeal. The proceeding was originally commenced by J. K. Sears, a citizen and taxpayer of the State of Oregon, against F. I. Dunbar, who was the Secretary of State of the State of Oregon from January 9, 1899, to January 14, 1907. It is alleged that during that time he collected and received for the benefit of the State of Oregon a large amount of money, viz., \$100,000, as fees for various filings, copies of records, issuing various commissions and

licenses, and recording various papers in his office, and neglected and refused to deliver the same or any part thereof to his successor in office, or to any one authorized to receive the same, but has converted the same to his own use, and asks for an accounting thereof and a decree requiring him to pay the same to the State of Oregon. The defendant demurred to this complaint, which was sustained by the court on March 29, 1907, upon the ground, as we understand, that plaintiff had not legal capacity to sue, and thereafter, on the same day, John H. McNary, District Attorney for the Third Judicial District, moved the court that the State of Oregon *ex rel.* J. H. McNary, as district attorney, be substituted for Sears as plaintiff in said suit, said motion being based on affidavit; and also tenders an amended complaint entitled, "The State of Oregon, upon the relation of J. H. McNary, as District Attorney of the Third Judicial District of Oregon, Plaintiff, v. F. I. Dunbar, Defendant." Except the title, such amended complaint is in substance and effect the same as the original, and seeks the same relief. Afterward, on April 9, 1907, the defendant filed a motion to dismiss the suit, for the reason that the demurrer was sustained and no amended complaint filed by Sears within the time provided by law. This motion was, on April 12, 1907, overruled, and the motion of J. H. McNary for substitution of the State of Oregon as plaintiff and leave to file the amended complaint was allowed, and defendant was given until April 25th to answer thereto. Thereafter, on April 22d, defendant took this appeal from the order of the court denying his motion to dismiss the suit and granting plaintiff's motion for substitution, and on May 21, 1907, plaintiff filed a motion here to dismiss the appeal for the reason that the order appealed from is not a final order, nor one from which an appeal will lie.

DISMISSED.

Mr. John H. McNary, District Attorney, and *Mr. L. H. McMahon*, for the motion.

Mr. George Clyde Fulton and *Mr. George Greenwood Bingham*, *contra*.

Opinion by MR. JUSTICE EAKIN.

1. The question is whether the order appealed from is a final order, or one from which an appeal will lie at this stage of the proceeding. Our statute (Section 547), as amended (Laws 1907, p. 313, c. 162), provides:

"A judgment or decree may be reviewed as prescribed in this chapter, and not otherwise. An order affecting a substantial right, and which in effect determines the action or suit so as to prevent a judgment or decree therein, or a final order affecting a substantial right, and made in a proceeding after judgment or decree, or an order setting aside a judgment and granting a new trial, for the purpose of being reviewed, shall be deemed a judgment or decree."

It is held in *State v. Security Sav. Co.* 28 Or. 410 (43 Pac. 162) and *School District v. Irwin*, 34 Or. 431 (56 Pac. 413), that an appeal is statutory and cannot be extended to cases not within the statute, and it has frequently been decided by this court that an appeal will not lie except from a final order affecting a substantial right: *State v. O'Day*, 41 Or. 495 (69 Pac. 542), and cases cited.

2. Counsel for defendant insists, however, that, the demurrer to the complaint of Sears being sustained, the substitution of the State by the amendment is the commencement of a new suit, and that the order was final as to the Sears complaint or suit. No authorities are cited by defendant in support of his position. Whether the amendment is one authorized by the statute is not the question, but whether the court lost jurisdiction of the defendant by the substitution. The effect of the amendment is to eliminate Sears because he was not a necessary or proper party, and it is final as to him; but the defendant is claiming no relief against him, and he is not affected thereby. Granting leave to plaintiff to amend his pleading is within the power of the court, and, even though such power was exercised erroneously, yet the order is not void. The action of the court in sustaining the demurrer to the complaint did not terminate the jurisdiction of the court. Section 101, B. & C. Comp., provides:

"If the demurrer be sustained, the court may in its discretion allow the party to amend the pleading demurred to."

Section 102 provides:

"The court may, at any time before trial, in furtherance of justice, * * allow any pleading * * to be amended by adding the name of a party, or * * by striking out the name of any party."

While the court has jurisdiction of the case, the order allowing the amendment is one within its jurisdiction, even if erroneous.

3. At the hearing counsel argued this motion upon the merits of the appeal, on the theory that, if the order allowing the substitution was error, then it is appealable; but we may not decide the merits upon this motion. If, in determining the motion to dismiss the appeal, it is necessary to determine the merits as to the substitution, then this motion must be denied. Whether the order was error or not, it is not appealable, unless it terminates or disposes of defendant's rights in the subject of the suit. Many courts have discussed the right to such substitution, usually brought to the appellate court upon the appeal from final judgment, and it was always treated as a matter within the jurisdiction of the court, and not affecting the merits. Such are the following cases: *Davis v. Mayor of New York*, 14 N. Y. 506 (67 Am. Dec. 186); *Dubbers v. Goux*, 51 Cal. 153; *Vinegar Bend Lum. Co. v. Chicago T. & T. Co.* 131 Ala. 411 (30 South. 776), cited by defendant on the merits; *Johnson v. Martin*, 54 Ala. 271; *Campbell & Z. Co. v. Barr Pumping Eng. Co.* 182 Mass. 304 (65 N. E. 396); *Wells v. Stombock*, 59 Iowa, 376 (13 N. W. 339); *McCall v. Lee*, 120 Ill. 261 (11 N. E. 522); *Lake Erie & W. Ry. Co. v. Town of Boswell*, 137 Ind. 336 (36 N. E. 1103), and many other cases might be cited. In *Chicago, K. & W. Ry. Co. v. Butts*, 55 Kan. 660 (41 Pac. 948), it is held that an order of substitution is not a final order, and therefore not appealable. To the same effect are *Bossler v. Johns*, 2 Pen. & W. (Pa.) 331; *Welch v. Allen*, 54 Cal. 211; *Hall v. Vanier*, 7 Neb. 397; *Grant v. Los*

Angeles & Pac. Ry. Co. 116 Cal. 71 (47 Pac. 872). In *Chicago, K. & W. Ry. Co. v. Butts*, 55 Kan. 660 (41 Pac. 948), it is held that the order of substitution was error, but not appealable, and it was reviewed upon the appeal from the final judgment.

If the order of the court was made in a matter beyond its jurisdiction or in relation to a matter of which it had not acquired jurisdiction, then it might be appealable; as to the adverse party to that proceeding it would be final. But error in an interlocutory order within the jurisdiction is not sufficient to render it void or operate as a final order. In *Hume v. Bowie*, 148 U. S. 245, 252 (13 Sup. Ct. 582, 584: 37 L. Ed. 438), the court had before it a question involving the same principle. In that case a motion was made to vacate a decree rendered at a previous term and to grant a new trial, which motion was allowed by the court below. It was insisted by respondent that the order was not final, and therefore not appealable. Mr. Chief Justice FULLER says: "This case comes before us on a motion to dismiss the writ of error for want of jurisdiction, upon the ground that the judgment brought here by the writ is not a final judgment. * * The question involved is one of power, for if the court had power to make the order when it was made, then it was not a final judgment, as it merely vacated the former judgment for the purpose of a new trial upon the merits of the original action. If the court had no jurisdiction over that judgment, the order would be an order in a new proceeding, and in that view final and reviewable." And in *Bronson v. Schulten*, 104 U. S. 410 (26 L. Ed. 727) the same identical question arose, in which it was held that, if there was no jurisdiction, then the order was final, otherwise, not. In *Phillips v. Negley*, 117 U. S. 665, 671 (6 Sup. Ct. 901, 903: 29 L. Ed. 1013), it is held: "If, properly considered, the order in question was an order in the cause which the court had power to make at the term when it was made, the consequence may be admitted that no appellate tribunal has jurisdiction to question its propriety. * * The vacating of a judgment and grant-

ing a new trial in the exercise of an acknowledged jurisdiction, leaves no judgment in force to be reviewed. If, on the other hand, the order made was made without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court." The same is held in *Deering v. Quivey*, 26 Or. 556 (38 Pac. 710).

4. Although these cases all relate to motions to vacate judgments, they determine what constitutes a final or appealable order. How can it be said that an order is final when it does not terminate the suit or in any manner end the litigation as to the subject-matter or as to defendant? An order that may be deemed a decree is defined in B. & C. Comp. § 547, as one "which in effect determines the action or suit so as to prevent a judgment or decree therein"; but no such effect results from this order. Mr. Chief Justice MOORE, in *Marquam v. Ross*, 47 Or. 374, 383 (78 Pac. 698), reviews the Oregon cases as to what are final orders, and construes Section 547, B. & C. Comp., and concludes: "It will be seen that the original adjudication of the right involved within the issues is the judgment or decree from which an appeal lies." In *State v. Security Sav. Co.* 28 Or. 410, 417 (43 Pac. 162), it is held that, where the right to the relief sought is determined, it is final and appealable. "An order or decree is final for the purposes of an appeal when it determines the rights of the parties, and no further questions can arise before the court rendering it except such as are necessary to be determined in carrying it into effect." In *Basche v. Pringle*, 21 Or. 24 (26 Pac. 863), Mr. Justice BEAN says an appealable judgment "is one which concludes the parties as regards the subject-matter in controversy in the tribunal pronouncing it."

From these authorities it is clear that, if the ruling had the effect to finally terminate defendant's rights or interest in the subject of the suit, it was final as to him, even though it did not determine the merits of the case, or if it was made without jurisdiction; that is, in a case or as to matter not within the power of the court it would be final, even though only an

interlocutory order. In this case the defendant's rights are not concluded by the ruling. Neither is the order one made without jurisdiction, and the appeal is premature, and must be dismissed.

APPEAL DISMISSED.

Argued 14 February, decided 9 April, 1907.

BUDD v. GALLIER.

89 Pac. 688.

EXECUTION—LIABILITY OF EQUITABLE INTEREST—JUDGMENT.

1. An equitable interest in real property is not subject to levy and sale on execution, and a judgment is not a lien thereon.

PUBLIC LAND—INTEREST OF ENTRYMAN—LIEN OF JUDGMENT AFTER ISSUANCE OF FINAL RECEIPT.

2. Where an entryman on government land completes the required residence on the tract, and makes his final payment, receiving a receipt therefor, he thereby acquires more than an equity, he has an inchoate legal title that is included within the meaning of the expression "real property," used in Section 206, B. & O. Comp., providing that a judgment properly docketed shall be a lien on the real property of the defendant in the county where such judgment is docketed.

Where one has made final proof and paid the purchase price of land applied for under the timber and stone act,* and received the final receipt therefor, such land becomes "real property" of the purchaser and subject to the lien of a judgment docketed against him.

JUDGMENT—DOCKETING IMMEDIATELY—DIRECTORY STATUTE.

3. The provision in Section 206, B. & O. Comp., that the clerk shall enter a judgment in the proper docket "immediately" after it has been entered, is directory only, and a delay by the clerk in performing his duty does not affect the lien from the time when the judgment is docketed.

SAME—CASE UNDER CONSIDERATION.

4. The lien of a judgment on real property created by the filing of a transcript of a judgment from another county, under Section 206, B. & O. Comp., is not affected by the fact that the clerk's certificate to the transcript shows it to be a true copy of the original "judgment lien docket," though in the statute, Section 584, B. & O. Comp., such record is called a "judgment docket," where it appears from the entry of the transcript that the judgment was originally entered in a book in which the judgments and decrees of the court were regularly docketed, and which contained the proper rulings and headings provided by law for a judgment docket.

From Coos: JAMES W. HAMILTON, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a suit for an injunction by J. Danly Budd against Stephen Gallier, as sheriff, and W. B. Andrews. On June 15,

*Act Cong. June 8, 1878: 20 Stat. U. S. 89, c. 151; U. S. Comp. St. 1901, p. 1545; 7 Fed. Stat. Ann. 800.

1892, W. B. Andrews recovered judgment for \$213.40 against W. L. Dysinger in the circuit court for Lane County. In June, 1902, Dysinger filed his sworn statement or application in the United States Land Office at Roseburg for the purchase of 160 acres of public land in Coos County, under the act of Congress of June 3, 1878 (20 Stat. at Large, p. 89, c. 151: 7 Fed. Stat. Ann. 300: U. S. Comp. St. 1901, p. 1545), known as the timber and stone act. On June 14th following, Andrews caused his judgment to be docketed in the circuit court docket of Lane County, and on July 25th filed a transcript of such entry in the office of the clerk of Coos County, and the same was immediately entered in the proper judgment docket of that county. On August 26, 1902, Dysinger made his final proof, paid the purchase price of the land applied for by him and received from the local land office a receipt or certificate of such payment, and on the same day conveyed the land to the plaintiff by a sufficient warranty deed. On February 27, 1903, Andrews caused execution to issue on the judgment recovered by him against Dysinger and the land in question to be sold thereunder. The plaintiff thereafter commenced this suit to enjoin the sheriff from executing a deed to the purchaser at such sale and to remove an alleged cloud on his title caused by Andrews' judgment. A demurrer to the complaint was sustained and the suit dismissed, and the plaintiff appeals. . . . **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. John Thomas Long*.

For respondents there was a brief over the names of *Joseph William Bennett* and *F. W. Benson*, with an oral argument by *Mr. Bennett*.

Opinion by MR. CHIEF JUSTICE BEAN.

1. The principal question for decision is whether the judgment of Andrews against Dysinger was a lien upon the property in controversy at the time of the conveyance to the plaintiff. The statute provides:

- "From the date of docketing a judgment * * such judgment shall be a lien upon all the real property of the defendant

within the county or counties where the same is docketed, or which he may afterwards acquire therein, during the time an execution may issue thereon": B. & C. Comp. § 205.

The contention for the plaintiff is that "real property," within the meaning of this statute, is only that to which the judgment debtor has full and complete legal title, and, since the patent had not issued to Dysinger at the time of his conveyance to plaintiff, he had only an equitable title, the legal title being in the government, and therefore the Andrews judgment was not a lien on the property so conveyed. It may be regarded as settled that a judgment is not a lien on a mere equitable interest or title, which can only be ascertained, established or made available in a court of equity: *Smith v. Ingles*, 2 Or. 43; *Bloomfield v. Humason*, 11 Or. 229 (4 Pac. 332); *Silver v. Lee*, 38 Or. 508 (63 Pac. 882). In each of these cases the judgment debtor had no title to the property sought to be charged with the lien. In the Smith and Silver cases, he had purchased the property and caused it to be conveyed to another for the purpose of defrauding creditors, and in the Bloomfield case the title was held by a trustee. The interest of the judgment debtor, therefore, was such as a court of equity alone could take notice of and which required the aid of such a court to establish and make available. There was consequently no interest of the judgment debtor which a court of law could recognize or to which the judgment lien could attach. His right was a mere equity and the claim of his creditors could be worked out only through a suit in equity to which all persons claiming an interest in the property must or should be made parties, and in which their respective rights could be ascertained and determined and a decree rendered directing the sale of some certain and definite title.

2. But a purchaser of land from the Government of the United States, who has in good faith fully complied with the law providing for its sale, paid the purchase price and received a final certificate or receipt, has more than a mere equity. He has a substantial title to the property which he may devise or

convey and which descends to his heirs. The technical legal title remains in the government until the patent has issued, but the real beneficial title is in the purchaser, and it is his "real property." Where a purchaser complies with the provisions of the law for the disposition of public lands, pays the purchase price and receives a final receipt or certificate therefor, he has done all that is required to vest the complete title in him, and he thereby acquires a title of which he cannot be deprived by the government except for fraud or mistake. He may sell or devise the same at pleasure, and may maintain an action of ejectment to recover its possession. In short, he has the substantial and beneficial title, or, as some of the books say, "the inchoate legal title." When the right to a patent once becomes vested, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of a patent are mere ministerial acts of the officers charged with that duty, and when issued relate back to the date when the right thereto became perfected: *Witherspoon v. Duncan*, 74 U. S. (4 Wall.) 210 (18 L. Ed. 339); *Stark v. Starr*, 73 U. S. (6 Wall.) 402 (18 L. Ed. 927); *Barney v. Dolph*, 97 U. S. 652, 656 (24 L. Ed. 1063); *Deffebach v. Hawke*, 115 U. S. 392 (29 L. Ed. 423; 6 Sup. Ct. 95); *Cornelius v. Kessel*, 128 U. S. 456 (32 L. Ed. 482; 9 Sup. Ct. 122). The final certificate may, of course, be canceled by the government for fraud or mistake, and one succeeding to the grantee's interest prior to the issuance of a patent takes subject to such contingency: *Hawley v. Diller*, 178 U. S. 476 (44 L. Ed. 1157; 20 Sup. Ct. 986); *American Mortgage Co. v. Hopper*, 64 Fed. 553 (12 C. C. A. 293). But a patent, after it has issued, may be canceled or annulled for like reasons. In this regard there is no essential difference, so far as the grantee is concerned, between a certificate and a patent, except in the tribunal having jurisdiction of the matter. Before patent has issued, the cancellation may be made by the land department, but after patent, the remedy is in the courts.

The right of a purchaser to land from the United States

after the payment and acceptance of the purchase price was before the supreme court in *Carroll v. Safford*, 44 U. S. (3 How.) 441 (11 L. Ed. 671), and it is there said: "When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be canceled by the United States than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee. It is said the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not in equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators. In every legal and equitable aspect it is considered as belonging to the realty." And in *Sillyman v. King*, 36 Iowa, 207, in referring to the same matter, the court says: "When land is purchased by an individual from the United States it is no longer the property of the government, but of the purchaser, unless it has been reserved from sale or has been previously sold, and then the entry might be canceled on the ground of mistake. But when there is no such mistake, the holder of the certificate of entry or location, having purchased and paid for the land, is the owner thereof, and, although the naked technical legal title remains in the United States until the patent is issued, yet, in equity, the title is in the purchaser. The holder of the certificate is the owner in the same sense as if he held the patent. The issuance of the patent only perfects the evidence of his ownership." And in *Goodlet v. Smithson*, 5 Port. 245 (30 Am. Dec. 561), it is held that a purchaser of land from the United States acquires an inchoate legal title which he may alienate or devise in the same manner as any other legal title; that the law under which the purchase is made and not the patent gives the title and the patent is but evidence that the prerequisites of a legal sale have been complied with.

In this case there is no contention that Dysinger's purchase was not made in good faith and in strict compliance with the law. When, therefore, he made full payment of the purchase price and received his final certificate or receipt, the land became to all intents and purposes his "real property." He was thereafter as much the owner as if he actually had the patent. The land was subject to taxation as his property (*Carroll v. Safford*, 44 U. S. 441), and it could be alienated or devised as such: *Sillyman v. King*, 36 Iowa, 207. It was not necessary for him to invoke the aid of a court of equity to ascertain or establish his interest. That was fixed and determined by the law under which he made the purchase. Nothing remained for him to do but to await the final issuance of a patent in due course. There is no reason why land held under such a title should not be considered real property within the meaning of the statute and subject to the lien of a judgment against the owner, and such is the opinion of the text writers and adjudged cases: 1 Black, Judgments, § 422; 1 Freeman, Judgments, § 356; *Pogue v. Simon*, 47. Or. 6 (114 Am. St. Rep. 903; 8 Am. & Eng. Ann. Cas. 474; 81 Pac. 566); *Goodlet v. Smithson*, 5 Port. 245 (30 Am. Dec. 561).

3. The judgment in favor of Andrews and against Dysinger was rendered June 15, 1892, but was not entered in the lien docket until June 14, 1902, and counsel for the plaintiff contends that because it was not docketed "immediately" after its rendition, the right to docket it at all was lost. The statute provides that "immediately after the entry of judgment in any action, the clerk shall docket the same," etc.: B. & C. Comp. § 205. But this is a direction to the clerk and a failure by him to discharge his duty in the premises does not affect the validity of the judgment or deprive the judgment creditor of the benefit of the lien created thereby when it is properly docketed. The object of requiring a judgment to be entered in the judgment docket is to notify intending purchasers and incumbrancers of the date of the rendition of the judgment and the amount of it. The judgment becomes a lien on the prop-

erty of the judgment debtor from the date of its docketing and the only question pertinent to the present inquiry is whether the judgment was in fact properly docketed at the time of plaintiff's purchase. If so, the object of the statute was accomplished and he cannot complain because the judgment was not docketed at an earlier date.

4. Complaint is made because in the clerk's certificate to the transcript of the judgment docket of Lane County filed in the clerk's office of Coos County, it is stated that such transcript is a true and correct copy of the original circuit court "judgment lien docket"; while such record is denominated in the statute "judgment docket": B. & C. Comp. § 584. But from the entry itself it appears that it was made in a book in which the judgments and decrees of the circuit court were docketed and substantially conforms to the requirements of Section 584, contains the information required to be entered in the judgment docket, and was, therefore, sufficient.

There are some technical objections to the validity of the lien, but they are without merit. The entries in the circuit court judgment docket of Coos County, when explained by the certified transcript on file with the clerk, show that the judgment of Andrews against Dysinger was rendered in the circuit court for Lane County, was entered in the journal of that court, and was docketed in the circuit court docket of both Lane and Coos counties on certain dates. Finding no error in the decree, it is affirmed.

AFFIRMED.

Argued 11 July, decided 30 July, 1907.

ALDERMAN v. TILLAMOOK COUNTY.

91 Pac. 298.

INJUNCTION TO RESTRAIN VEXATIOUS LITIGATION.

1. Administratrix, at the time a proceeding for her removal was instituted in the county court by the county, claiming to be a creditor, was engaged in litigation over a claim for a large sum of money asserted by the county against the estate of which she was administratrix, and was making an honest and apparently successful defense thereto, and the county had been unable to establish its claim; and it was for the purpose of preventing administratrix from making such defense and to enable the county to succeed that it instituted a proceeding for her removal. The county judge had been very active

in the county's behalf, and it was under his direction that the litigation against the estate was being conducted. *Held*, that administratrix was entitled to enjoin the prosecution of the proceeding for her removal, the case presented being one that appealed strongly to equity.

EFFECT OF INJUNCTION RESTRAINING LITIGATION IN OTHER COURTS.

2. An injunction in a suit to enjoin litigation does not interfere with the jurisdiction of the court in which such litigation is pending, but operates on the parties, preventing them from taking further proceedings.

INJUNCTION—PROCEEDINGS IN OTHER COURTS—ADEQUATE REMEDY.

3. In a suit by an administratrix to restrain a probate judge and an alleged creditor of an estate in his court from taking further steps in a proceeding before said judge to remove plaintiff on the ground that the judge had conspired with the alleged creditor and agreed to make such removal regardless of the facts and of the law, the right of plaintiff to contest the application and appeal from the order of removal is not such an adequate remedy as to bar the equitable remedy of enjoining vexatious and unjust litigation.

ABATEMENT AND REVIVAL.

4. A suit to restrain a probate judge and a creditor of an estate that was in his court from removing the administratrix is not abated by the expiration of the judge's term of office, for it continues as to the creditor, and an injunction against him will be effective to stop vexatious proceedings.

From Tillamook: **WILLIAM GALLOWAY, Judge.**

Suit by Edith A. Alderman, as administratrix of the estate of H. H. Alderman, deceased, against Tillamook County and others, for an injunction, resulting in a decree dismissing the complaint on demurrer, from which plaintiff appealed.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Ralph Rolofson Duniway*.

For respondents there was a brief over the name of *Thayer & Johnson*, with an oral argument by *Mr. Sidney Smith Johnson*.

Opinion by **MR. CHIEF JUSTICE BEAN.**

This suit was brought by the plaintiff against Tillamook County, W. W. Conder, county judge thereof, and Handley & Thayer, its attorneys, to enjoin and restrain the prosecution of a proceeding instituted by the county in the county court of such county for the removal of the plaintiff as administratrix of her husband's estate. A demurrer to the complaint was sustained in the court below, and the sufficiency of the complaint is the only question for determination on this appeal.

The facts alleged in the complaint are that H. H. Alderman, the husband of plaintiff, was sheriff and *ex officio* tax collector of defendant county from September 7, 1897, until his death, January 24, 1904. Soon after his death plaintiff was duly and regularly appointed administratrix of his estate, and on July 28, 1904, the defendant county presented to her, as such administratrix, a claim against the estate of her intestate for \$8,127.17 for money alleged to have been received by him as tax collector and not paid over to the county or otherwise accounted for. This claim was examined and disallowed by the plaintiff on August 1, 1904. On September 7th of that year the county, acting through the defendant Conder, as county judge, entered into a written contract with Handley & Thayer, by the terms of which they agreed, for a certain per cent of the amount recovered, to immediately commence and prosecute to final decision any and all necessary and practicable legal process to enforce the claim of the county against the intestate's estate for moneys collected by him and not accounted for, no suit or action, however, to be commenced without the approval of the county judge. About the time of the making of this contract the claim of the county, which had been presented to and disallowed by the plaintiff as administratrix, was, in pursuance of Section 1161, B. & C. Comp., presented to the county court, presided over by the defendant Conder, for allowance, and the same was, on October 6th, duly allowed by him. The plaintiff appealed from this order, and pending the determination thereof the defendant county, through its attorneys, and by the sanction of Conder, commenced a suit in equity against plaintiff to subject certain real property, the title to which was in her name, to the payment of its claim, on the ground that such property had been conveyed to her by her husband for the purpose of defrauding creditors. The complaint was verified by Conder, and alleged that the county was a creditor of the estate by virtue of the order of the county court allowing its claim. Before this suit came on for hearing the appeal of the plaintiff from the order of the county court allowing the claim was

heard and decided in her favor, and no appeal has been taken from such decision, and it has become final. The plaintiff thereupon pleaded such judgment in abatement of the suit referred to. This plea was sustained and the suit dismissed, on the ground that the county had not reduced its claim against the estate to judgment, and therefore could not maintain a creditor's bill to subject property held by her to its payment.

On October 25, 1905, while this suit was pending and undetermined, the defendant county, through its attorneys and by the direction of Conder, as county judge, commenced four separate suits in equity against plaintiff and certain persons alleged to have been bondsmen of her husband, to restore lost bonds and for an accounting, and also an action at law against plaintiff as administratrix of her husband's estate, to establish its claim against such estate. The complaint, in all these suits and in the action, was verified by Conder as county judge, and the litigation was prosecuted with his approval and sanction. The plaintiff appeared in each of these suits and in the action, and was making apparently successful defenses thereto, when defendant county, acting through its attorneys, filed a petition in the county court, of which the defendant Conder was judge, alleging that it was a creditor of the estate of plaintiff's decedent, and that she had been unfaithful in her trust as administratrix, because she had failed and neglected to include in the inventory thereof certain real property, the title to which was in her name, but which, it was alleged, had been conveyed to her by her husband in fraud of creditors, and praying that she be cited to appear and show cause why she should not be removed as administratrix. The plaintiff thereupon commenced this suit to enjoin further prosecution of such proceeding, alleging that it was instituted in pursuance of a conspiracy entered into by Conder, as county judge, and the attorneys of the county, to deprive the estate of her husband of any defense in the several suits and action pending against such estate by removing her as administratrix and appointing some one friendly to the county's interest. It is alleged that it was

agreed, as a part of the conspiracy, that the attorneys should, in the name of the county, file false charges of misconduct against plaintiff, as administratrix, in the county court, over which defendant Conder presided, and that Conder, acting as judge of such court, should make an order removing her, without regard to any defense she might make, and that he would appoint another as administratrix of such estate, who would confess judgment in favor of the county in the several suits and action then pending, and thereby deprive the estate of any defense thereto; that Conder had been active in prosecuting the county's claim against the estate, and had agreed to decide all questions brought before him in favor of the county, and to remove the plaintiff as administratrix whenever he got an opportunity to do so; that, if she is removed by the county court, her right to act as administratrix will be suspended, pending an appeal from such order, and before the same could be heard or determined the estate and the bondsmen of her husband will forever be deprived of the right to make any defense to such suits and action; that the claim of the county is wrongful and illegal, and without merit, and, if permitted, the plaintiff can make a successful defense thereto.

1. That a court of equity has jurisdiction to enjoin pending or threatened proceedings in another court to prevent oppressive and vexatious litigation, and especially when such litigation is not brought in good faith, but is instituted for an illegal and wrongful purpose, is undisputed: 22 Cyc. 790, 793; 2 Story, Equity, § 901; *Norfolk & N. B. H. Co. v. Arnold*, 143 N. Y. 265 (38 N. E. 271). The courts are not agreed as to what constitutes such litigation, and, as said by Mr. Justice GRAY, "every case must necessarily be governed in its disposition by its facts and circumstances, and the discretion of the court must be influenced in its exercise by a consideration of the relative injury and convenience which may result from granting or refusing equitable relief by way of injunction": *Bomeisler v. Farster*, 154 N. Y. 229, 238 (48 N. E. 534, 535: 39 L. R. A. 240). It is unnecessary at this time for us to at-

tempt to lay down any general rule on the subject or review the authorities. From the allegations of the complaint, which for the purposes of this appeal are admitted by the demurrer, and must be taken as true, a case appealing more strongly to a court of equity for relief could rarely be found. The plaintiff and defendant, at the time the proceedings for her removal were instituted in the county court, were engaged in litigation over a claim for a large amount of money asserted by the county against the estate of which plaintiff is administratrix. The county had brought sundry actions, suits and proceedings to establish its claim. The plaintiff was making an honest and apparently successful defense thereto, and the county had been unable to establish its claim. To prevent the plaintiff from making such defense, and to enable the county to succeed in the litigation, it instituted a proceeding for her removal in the court presided over by the person who had been most active on its behalf and under whose direction the litigation was being conducted. To give it an apparent standing to maintain such proceeding, it alleges that it was a creditor of the estate, although it had not established its claim to that relationship and was not entitled to the rights of a creditor. It seems manifest, therefore, that the proceeding could not have been instituted in good faith, but for the purpose of vexing, annoying and harassing plaintiff, and to illegally and wrongfully deprive the estate of which she is administratrix of the right to defend against the action and suits brought by the county on an alleged wrongful claim. Under these circumstances we are of the opinion that a court of equity should not hesitate to interfere by injunction to protect the rights of the plaintiff. If the county has a valid claim against the estate, the courts are open to it; but it should establish such claim in a regular and orderly manner, and not be permitted to resort to proceedings of the kind here instituted for the purpose of taking an undue advantage of its opponent.

2. It is argued that the county court has exclusive jurisdiction in the first instance over proceedings in the administra-

tion of estates and the appointment and removal of executors and administrators, and that this is an attempt to interfere with such jurisdiction by injunction. But this is in no sense a proceeding to interfere with the jurisdiction of the county court. It is not and could not be made a party to the suit. Any process which will issue will not be addressed to the court and will not interfere with it in any way. A decree, if rendered, will operate only on the parties, by restraining them from proceeding further with the litigation in such court, and this is a jurisdiction clearly vested in a court of equity upon a proper case being made: *Keyser v. Rice*, 47 Md. 203 (28 Am. Rep. 448); *Claflin v. Hamlin*, 62 How. Prac. 284. In *Dehon v. Foster*, 4 Allen (Mass.), 545, Mr. Chief Justice BIGELOW says: "The authority of this court as a court of chancery, upon a proper case being made, to restrain persons within its jurisdiction from prosecuting suits either in the courts of this state or of other states or foreign countries, is clear and indisputable. In the exercise of this power courts of equity proceed, not upon any claim of right to interfere with or control the course of proceeding in other tribunals, or to prevent them from adjudicating on the rights of parties when drawn in controversy and duly presented for their determination; but the jurisdiction is founded on the clear authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process, to restrain them from doing acts which will work wrong and injury to others, and are therefore contrary to equity and good conscience. As the decree of the court in such cases is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in the courts of a foreign state or country."

3. Again, it is said that the remedy of the plaintiff is to appear in the county court and contest the proceeding there, and, if the decree is against her, to appeal. But under the averments of the complaint such a remedy would be a mere mockery of justice. The case against her had been prejudged,

and the decree to be entered agreed upon before the proceeding was instituted, and any attempt to make a defense thereto by plaintiff would be futile and unavailing. It is true she could appeal from any decree rendered against her, but the appeal would not stay the order removing her as administratrix; but the duties of that position would devolve upon the person appointed in her place: *Knight v. Hamaker*, 33 Or. 154 (54 Pac. 277, 659). And thus the object and purpose of the conspiracy in pursuance of which the proceeding was instituted would be accomplished before the appeal could be heard and determined.

4. It is also suggested that Conder's term as county judge has expired; but this is no reason why the action should abate. Until the county has established its claim against the estate in some manner provided by law, it ought not to be permitted to vex and annoy plaintiff with needless and unnecessary proceedings for her removal.

We are of the opinion, therefore, that the decree of the court below should be reversed, the demurrer to the complaint overruled, and a decree entered in favor of plaintiff.

REVERSED.

Argued 28 March, decided 14 May, 1907.

OLLSCHLAGER'S ESTATE.

89 Pac. 1049.

APPEAL—PRESUMPTION OF VERITY OF RECORD.*

1. The record on appeal must be regarded as giving a true statement of the occurrences in the case, and *ex parte* certificates or affidavits cannot be considered against the transcript.

ADMINISTRATORS—FINAL ACCOUNT—RIGHTS OF OBJECTORS.

2. Where persons claiming to be heirs file objections to an administrator's final account, they are entitled to have them disposed of in a proper and orderly way, and not summarily dismissed on the unsupported assumption that they are not heirs.

RECORD OF ANOTHER CASE AS EVIDENCE—JUDICIAL NOTICE.

3. Courts do not take judicial notice of the records of other cases before them, therefore the papers in other proceedings must be offered in evidence to be available in a given case.

*NOTE.—See also *State v. McCaffrey*, 26 Or. 57, and *State v. Walton*, 50 Or. —
REPORTER.

Where objections have been filed to an administrator's final account, the record in a previous guardianship proceeding in the same court cannot be considered in determining whether the objectors are heirs, unless it is received in evidence after being properly offered.

From Marion: WILLIAM GALLOWAY, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

On March 26, 1904, Theodore M. Barr was appointed administrator of the estate of Henry Ollschlager, deceased, by the county court of Marion County on the petition of Mary Ollschlager, who alleged that she was the widow and only heir at law. On December 9, 1904, Barr filed his final account as such administrator, showing on hand for distribution about \$18,000, and praying for an order approving his account, and directing the distribution of the property to Mrs. Ollschlager. An order was made fixing January 14, 1905, as the time for hearing objections to such account and requiring that notice thereof be given, as provided by law. On January 13, 1905, J. M. Widmer and others, who allege that they are heirs at law of Ollschlager and entitled as such to one-half of his estate, filed objections to the allowance of certain items in the final account and to the proposed order of distribution. On January 24th the administrator moved for an order striking from the files the objections of the Widmers for the reason that they are not heirs at law of the deceased or entitled to any part of his estate, and that Mrs. Ollschlager is the sole heir and only person entitled to such estate. No further proceedings were had until March 8th, when the matter came on to be heard on the final account, the objections filed thereto by the Widmers and their application to file amended objections, in which other parties claiming to be heirs joined; whereupon the Widmers moved for a continuance to obtain testimony in support of their claim, but the court found "from the records and files in this case" that they were not the heirs at law of the deceased and had no interest in the estate, that Mrs. Ollschlager was the sole heir and only person interested therein, and thereupon overruled their motion for leave to file amended objections and for a continuance, approved the final account as filed, and

directed a distribution of the estate to Mrs. Ollschlager. From the decree the Widmers appealed to the circuit court.

The transcript on such appeal contains no testimony, and in the certificate of the clerk thereto it is stated that "no testimony, deposition, or other papers are on file in my office in said cause or containing any evidence to my knowledge heard or offered upon the hearing of the final account and the objection thereto in the matter of the estate of Henry Ollschlager, deceased." The cause was argued and submitted in the circuit court on May 9, 1905, on the transcript as certified to by the county clerk. While the cause was under advisement and pending a decision, the county judge, without permission of the court and without notice or knowledge to any of the parties in litigation, so far as this record discloses, filed with the county clerk a certificate signed by himself, stating that when the matter of the final account in the Ollschlager estate came on for hearing the administrator objected to the appearance of the objectors on the ground that they were not heirs at law of the deceased or otherwise interested in the estate, and the objectors offered no evidence in support of their claim, while the administrator offered in evidence and the court considered the records and files in this proceeding and in a former proceeding in the county court in the matter of the guardianship of the deceased, to which the objectors were parties and in which it was decided that they were not the heirs of Ollschlager, but that Mrs. Ollschlager was such heir, and that at the time of such decision the court had before it competent evidence satisfactory to it that Mrs. Ollschlager was the sole and only heir of the deceased. On the next day the circuit court dismissed the appeal and entered judgment against the appellants for costs and disbursements on the ground that the county court decided from evidence before it that the objectors were not heirs at law of the deceased, and, since such evidence did not accompany the transcript, the findings of the court could not be reviewed on appeal. From this decree the objectors appeal to this court.

REVERSED.

For appellants there was a brief with oral arguments by *Mr. Martin Luther Pipes* and *Mr. Carey Fuller Martin*.

For respondent there was a brief with oral arguments by *Mr. Peter H. D'Arcy* and *Mr. George Greenwood Bingham*.

Opinion by MR. CHIEF JUSTICE BEAN.

1. The decree appealed from must be reversed. The copy of the entry of the county court disposing of the objections filed to the final account of the administrator, as contained in the transcript, shows that the decision was made "from the records and files in this case," and the certificate of the clerk to such transcript states affirmatively that no testimony, deposition or other papers were on file in his office containing any evidence heard or offered on such hearing. It thus clearly appears from such transcript that the case was decided by the county court without the taking of testimony, and this record cannot be contradicted or enlarged by an *ex parte* certificate of the county judge filed in the circuit court after the cause had been argued and submitted: *Lew v. Lucas*, 37 Or. 208 (61 Pac. 344); *State v. McCaffrey*, 26 Or. 570 (38 Pac. 932). If the records of the county court did not truly state the facts there was an appropriate and proper method of correcting it, but it could not be done in the manner attempted.

2. The statute gives an heir the right to object to the final account of the administrator (B. & C. Comp. § 1203), and requires the court to hear any such objections and to allow or disallow the final account in whole or in part, as may be just and right: B. & C. Comp. § 1204. When, therefore, the Widmers, averring that they were heirs, filed objections to the final account, they were entitled to have such objections disposed of in an orderly and legal manner and not summarily dismissed on motion of the administrator on the mere assumption without proof that they were not in fact heirs of the deceased. The issue tendered by them was one of fact and should have been so considered and determined upon evidence regularly offered and submitted.

3. It was suggested that the conclusion of the county court was based upon the records and files in a previous guardianship proceeding in the same court to which the Widmers were parties. But the record in the guardianship proceeding, if there is such a record, could not have properly been considered until offered and admitted in evidence, thus giving the objectors an opportunity to make and save any question they might deem advisable as to its competency. The record of each particular case must be complete within itself and exhibit the ground upon which the final decision is based (*Simon v. Durham*, 10 Or. 52), and courts will not take judicial notice of former proceedings before them or the contents of their own record in other cases: 17 Am. & Eng. Enc. Law (2 ed.), 926. A judgment or decree must be based upon the record and evidence in the case and not upon some other record not in evidence nor upon knowledge acquired by the judge in some other proceeding.

For these reasons the decree of the court below must be reversed and the cause remanded to that court with directions to return it to the county court for such further proceedings as may be proper not inconsistent with this opinion.

REVERSED.

Argued 9 July, decided 6 August, 1907.

COLUMBIA LAND CO. v. VAN DUSEN INVEST. CO.

11 L. R. A. (N. S.) 287; 91 Pac. 460.

SILENCE AS AN ESTOPPEL—WANT OF RESULTING INJURY.

1. The mere silence of a party as to the location of the boundary of his property, or his refusal to state whether or not he has had a map made showing certain lines as dividing his property from that of his neighbor, does not create an estoppel against his proving the true location of such line.

NAVIGABLE WATERS—DIVISION OF ADJOINING FRONTAGE.*

2. A proper division of water frontage along a navigable stream requires that each owner shall have a proportionate share, and the various rules adopted by different courts have that purpose.

Where the shore line is substantially straight and a government pier line has been established in a wide river subject to high tides and having a deep channel for ocean vessels, it will be equitable to divide adjoining frontages by the line from a common line at the shore perpendicular to such pier line.

COSTS IN EQUITY.

3. In equity the costs and disbursements may be apportioned between the parties as the particular circumstances may render appropriate.

*NOTE.—See extensive note in 21 L. R. A. 706, *The Division of Water Front, Alluvial and Flats Between Adjoining Riparian Owners.* REPORTER.

From Clatsop: THOMAS A. MCBRIDE, Judge.

Statement by MR. JUSTICE EAKIN.

This is a suit by the Columbia Land & Investment Co. against the Van Dusen Investment Co. to establish the line dividing the water frontage between two shore owners. There was a decree for plaintiff, and defendant appeals. The upland bordering on the south shore of the Columbia River, owned by both plaintiff and defendant, is part of the Henry Marlin donation land claim. The plaintiff and defendant own in common the tidelands and water frontage (except that they have sold and conveyed portions thereof) in front of the shore line, beginning at a point in the meander line of the river where it is intersected by the division line between the Town of First Addition to Van Dusen's Astoria and the Town of Alderbrook; thence along said meander line to its intersection with the section line between sections 2 and 3, township 8 N., range 9 W., W. M.; thence northeasterly along said meander line to a point therein 736.2 feet distant on a straight line from said intersection. Plaintiff owns the tide land and water frontage in front of the shore line from that point easterly, and the line in dispute is the line which will divide the water front from this point of shore division. Plaintiff and defendant have heretofore jointly conveyed to Hume and others from such common holding all of such water frontage lying west of the following line, viz.: Beginning at a point 345.1 feet north 40 deg. 45 min. east from a point on the section line between sections 2 and 3, 50 feet north of the corner common to sections 2, 3, 10, and 11, and running thence north 10 deg. 12 min. west to the pier head line. Defendant claims that the dividing line should extend due north from the shore point of division; plaintiff claiming that it should be a line from the shore point of division at right angles to the pier head line.

REVERSED.

For appellant there was a brief over the name of *Fulton Bros.*, with an oral argument by *Mr. George Clyde Fulton*.

For respondent there was a brief with an oral argument by *Mr. John Frank Hamilton*.

Opinion by MR. JUSTICE EAKIN.

Attention is called to what appears to be an error made by the party who drew the findings and decree for the trial court. We find no data from which the lower court determined the angles of the shore line of plaintiff and defendant, and it is incorrectly expressed, viz., plaintiff's shore line base as 58 deg. north of east undoubtedly was intended as north 58 deg. east, the perpendicular to which is north 32 deg. west; and the same as to the defendant's shore line base, found as 48 deg. north of east, the perpendicular to which is north 42 deg. west, and the court's conclusion therefrom that the division line between plaintiff and defendant is 53 deg. west of north undoubtedly is a mistake, and was intended as north 37 deg. west, which bisects the angle between the said two perpendiculars. By this correction the finding of the court is intelligible. Otherwise the court gives to the plaintiff an angle of 26 deg. 12 min. greater than it asks.

1. It is not necessary to pass upon the question whether or not the defendant acquired, by adverse possession, title to any of the water front west of the east line of the property conveyed to Hume, as none of it is in dispute here, and can have no bearing upon plaintiff's right east of such line. Plaintiff's silence as to its claim that the division line between plaintiff and defendant should deviate from a due north course, or whether or not it used or had a map made, showing recognition of a due north line of division, does not preclude plaintiff now from proving the true line, as there has been no conduct amounting to estoppel. Defendant's claim that the various city plats of Astoria recognize the division of the water front upon north and south lines is without force. Each shore owner, in platting his land into lots and blocks, has platted the same approximately perpendicular with the shore, and in all but one case this results in extending such division lines due north into the water front. Although the general course

of the shore line is south of west, yet it is not regular, and, as to any one plat, the exterior lines thereof are practically perpendicular to the shore, and no conflicts between them have resulted. The general shore line of Alderbrook is east and west. As to Adair's plat, several blocks at the exterior lines are perpendicular to the shore line. The same is true of McClure's plat, and Shively's Astoria is laid out parallel with the shore, though not north and south, and the water front is divided at the same angle, while the shore line of the Henry Marlin claim extends more abruptly to the northeast.

2. A proper division in all cases is that each shore owner shall have a proportionate share of the deep-water frontage, and the rules adopted by the courts in relation thereto are with that end in view: 4 Am. & Eng. Enc. Law (2 ed.), 828; *Deerfield v. Pliny Arms*, 17 Pick 41 (28 Am. Dec. 276); *Blodgett Lum. Co. v. Peters*, 87 Mich. 498 (49 N. W. 917; 24 Am. St. Rep. 175); *Williams v. Lane*, 87 Wis. 152 (58 N. W. 77). The difference in such rules, as announced by different courts, is evidently due to the varying conditions in each case more than to the diversity of opinion as to equitable methods. The rule applicable to property situated in a cove, as adopted in *Rust v. Boston Mill Corp.* 6 Pick. 158, followed in several states, and relied upon by defendant here, is fair and equitable in cases where it can be applied, but will not apply here for the reason that this shore cannot properly be considered a cove. The headlands are probably four miles apart, and, being projections at the extremes of a long and irregular shore line, make such a basis of division impracticable: *Thornton v. Grant*, 10 R. I. 477 (14 Am. Rep. 701). Neither is it practicable to take the current of the stream as the basis from which to determine the division line. The township along the front of which Astoria is situated is a peninsula, extending into the river, having sheltered bodies of water on either side called bays. In front of the peninsula the river is very wide, probably three or four miles, the tide rising nine or more feet, and therefore we consider that the line of deep water frontage should be the basis

of apportionment, being the basis adopted for division of water frontage in lakes and tide water. This will not conflict with *Montgomery v. Shaver*, 40 Or. 244 (66 Pac. 923), as the situation is entirely different; but, taking the line of deep water as the basis of division instead of the thread of the stream, the result will be the same. In *Aborn v. Smith*, 12 R. I. 370, 372, it is said: "The problem here is to define water fronts in regard to a harbor line, not to divide flats or alluvion. The establishment of a harbor line, we have held, amounts to an implied permission to the riparian proprietors within it to fill out to it. The question is: How fill out to it? We answer, fill straight out to it. The owners of the upland are impliedly permitted to carry the upland forward to the harbor line so that each owner will occupy the part which is abreast his own land. There may be exceptional cases where the shore or the harbor line is so peculiar that permission to fill straight out cannot be applied. Perhaps it cannot be implied at the elbow which we have mentioned in the shore, where the harbor line diverges from a direct course. If there are several estates there, it cannot. The mode of filling in that case must be varied. But the variation ought to be limited by the necessity for it. * * It follows that the dividing line between the water fronts here, in case the parties have not established one for themselves, is a line drawn from the shore end of the dividing line of the upland to the harbor line so as to intersect it at right angles. This rule is analogous to the rule laid down in *Gray v. Deluce*, 5 Cush. 9." See, also, *Williams v. Lane*, 87 Wis. 152 (58 N. W. 77).

In the present case the government of the United States has established a pier head line at deep water adjacent to this property, and we believe a proper and equitable division of such deep water frontage will be to draw a line from such pier head line at right angles thereto to meet the division line between plaintiff and defendant at the shore. This is the rule adopted in 12 R. I. 370, above quoted. The government pier head line established in 1890 appears to have an angle in front of plain-

tiff's property at its intersection with the section line between sections 2 and 3 extended, and might thus work an inequality of division, as suggested in *Aborn v. Smith*, 12 R. I. 370, 372; and in such a case a general course of the pier head line should be taken: 4 Am. & Eng. Enc. Law (2 ed.), 828. However, the government in 1903 established a new pier head line in front of these properties, which appears to be straight, and therefore should control; and the decree will be modified to the extent that said division line shall be extended from the point of division at the shore in a course at right angles to the government pier head line established in 1903 to the intersection of the west line of the property conveyed by plaintiff and defendant jointly to Hume, and thence north 10 deg. 12 min. west on said west line of the Hume property to the said pier head line. As the record does not disclose the course of the pier head line established in 1903, we are unable to fix the course of division line between plaintiff and defendant therefrom.

The cause will therefore be remanded to the lower court to ascertain the course of the government pier head line established in 1903, to establish the division line therefrom between plaintiff and defendant, as above indicated, and to enter decree thereon.

3. Neither party shall recover costs on this appeal.

MODIFIED.

Argued 11 July, decided 20 August, 1907.

WOLF v. CITY RAILWAY CO.

85 Pac. 623, 91 Pac. 400.

APPEAL—TIME FOR FILING TRANSCRIPT—POWER OF COURT.

1. Section 558, B. & C. Comp., providing for appeals to the supreme court, and authorizing the court, upon the appeal being perfected, to extend the time for filing the transcript, does not require that the undertaking on appeal must be filed before an order can be taken enlarging the time to file the transcript, but only that such order must be taken before the expiration of time already allowed for that purpose.

TRIAL—DUTY OF COURT TO REJECT UNREASONABLE TESTIMONY.

2. Where the undisputed circumstances show that the testimony of a witness is so improbable and unreasonable that a fair mind must reject it, the court should withdraw such testimony from the jury.

STREET RAILROADS—INJURY TO PERSONS ON TRACK—EVIDENCE.

3. In an action for the death of plaintiff's intestate, caused by his being struck by a street car, evidence examined, and that of a certain witness for plaintiff held not so opposed to all reasonable probabilities as to require its exclusion, as a matter of law, from the jury.

STREET RAILROADS—INJURY TO PEDESTRIAN AT CROSSING—CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.

4. A person about to cross a street at a crossing is not bound to wait because a car is in sight; but if the car is at such a distance that he has time to cross, if it is run at the usual speed, it is not negligence, as a matter of law, to attempt to do so.

STREET RAILROADS—ACCIDENT AT CROSSING—CARE REQUIRED.

5. It is the duty of a street railway company, in operating its cars at street crossings, to use such care as is proportionate to the danger likely to be encountered, regardless of whether the rate of speed has been limited by statute or ordinance, or not.

SAME—REASONABLENESS OF SPEED IS FOR JURY.

6. Whether a given speed was reasonable for a street car in a large city at a crossing in a residence district is a question that should be submitted to the jury.

SAME—EVIDENCE—SUFFICIENCY.

7. That at the time a pedestrian was struck by a street car there were seven persons at or near the crossing justifies an inference that the street was much used.

RAILROADS AND STREET RAILROADS—RULES AS TO SPEED.

8. The rules governing the management and speed of steam railroads and electric street railways are not always the same, and a rule that is applicable to one may not be controlling against the other.

APPEAL—REVIEWING REFUSAL TO REDUCE VERDICT.

9. The action of a trial court in reference to a motion to set aside a verdict as excessive is not subject to review on appeal.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Action by Mollie Wolf, administratrix of the estate of Isaac Wolf, deceased, against the City & Suburban Railway Co. Judgment for plaintiff, and defendant appealed. A motion to dismiss the appeal was overruled, after which the case was heard on the merits.

MOTION DENIED: AFFIRMED.

Decided 12 June, 1906.

ON MOTION TO DISMISS THE APPEAL.

85 Pac. 620.

Mr. Alexander Bernstein for the motion.

Mr. Ossian Franklin Paxton and Mr. William P. Lord, contra.

PER CURIAM: Motion to dismiss an appeal because the transcript was not filed within the time allowed by law. The judgment from which the appeal was taken was rendered on October 7, 1905, and a notice of appeal thereupon given in open court. Thereafter and on the same day an order was made by the trial judge enlarging the time 60 days in which to file the transcript. On October 17, 1905, the undertaking on appeal was filed. On December 2d, a further order was made extending the time in which to file the transcript, and similar orders were subsequently made, each within the time allowed by the previous order, until February 26, 1906, when the transcript was filed in this court. The statute provides, in effect, that upon the appeal being perfected the appellant shall, within 30 days, or within such an extension of time as the trial court or judge thereof, or the Supreme Court or a justice thereof, may allow, file with the clerk of this court a transcript or such abstract as the rules of the court may require, but that the order enlarging the time "shall be made within the time allowed to file the transcript": B. & C. Comp. § 553. It is argued in support of the motion to dismiss that, under this statute, an order enlarging the time in which to file a transcript cannot be made by the trial court or judge thereof until after the appeal is perfected by the filing of an undertaking and the expiration of the time in which to except to the sureties thereon, and that such is the meaning of the words "within the time allowed to file the transcript," and therefore the order of October 7th was null and void, and as no transcript was filed within 30 days after the appeal was perfected, nor an order obtained within that period extending the time in which to file the transcript, the appeal should be dismissed. But this is too technical a construction of the statute to meet with our approval. The act of 1899 (Laws 1899, pp. 227, 229), which includes said Section 553 and is now in force governing the procedure on appeal, was designed to simplify such procedure, and to remove many of the technicalities with which it was hedged about prior to that time. It should, therefore,

receive a liberal construction to accomplish the end intended. The provision that an order enlarging the time "shall be made within the time allowed to file the transcript" simply means that it should be made before the appellant is in default: *Tallmadge v. Hooper*, 37 Or. 503, 508 (61 Pac. 349). And there is no valid reason why the trial court or judge thereof should not make such an order after the notice of appeal has been given, and before the appeal is perfected by the filing of an undertaking.

MOTION DENIED.

Decided 30 August, 1907.

ON THE MERITS.

91 Pac. 460.

For appellant there was a brief over the names of *O. F. Paxton* and *William P. Lord*, with oral arguments by *Mr. Lord* and *Mr. Ephraim Baynard Seabrook*.

For respondent there was a brief with oral arguments by *Mr. Alexander Bernstein* and *Mr. D. Solis Cohen*.

Opinion by MR. JUSTICE MOORE.

This is an action by *Mollie Wolf*, as administratrix of the estate of her husband, *Isaac Wolf*, deceased, against the *City & Suburban Railway Co.*, a corporation, to recover damages resulting from his death, which was caused by his being struck by one of the defendant's cars, August 26, 1902, in the City of Portland. The negligence alleged as a basis for the recovery is that the car causing the injury was being run down a steep incline on First Street, from Montgomery to Mill Street, at a reckless, dangerous and excessive rate of speed, and without any warning being given of its approach to the crossing at Mill Street, by reason of which carelessness, and without any fault on his part, *Wolf* sustained the injury at the intersection of First and Mill streets, a public crossing, which resulted in his death. The answer denies the material allegations of the complaint, and avers that at the time of the accident the defendant's agents and servants were exercising due care and

caution in conducting and managing the car, and that the hurt complained of was caused by the contributory negligence of plaintiff's intestate. The reply put in issue the allegations of new matter in the answer, and, the cause being tried, judgment was rendered against the defendant for the sum of \$5,000, and it appeals, assigning as error, *inter alia*, the action of the court in refusing to grant a judgment of nonsuit at the conclusion of plaintiff's case; and in denying a request to direct the jury to return a verdict for the defendant when all the testimony had been submitted.

A former judgment in this action for the sum of \$500 was reversed in consequence of the court's refusal to grant a nonsuit: *Wolf v. City Railway Co.* 45 Or. 446 (72 Pac. 329, 78 Pac. 668). The testimony produced at the last trial is substantially the same as that given at the prior hearing, except that one S. Price, who had not theretofore been called by either party, appeared as plaintiff's witness; and hence a determination of the errors alleged must rest upon a consideration of his declarations under oath, when examined in connection with other evidence. Before reviewing his testimony, however, it is deemed proper to call attention to the *locus in quo* where the injury occurred. The testimony shows that First Street, in the City of Portland, extends northerly on a downgrade from Montgomery to Mill Street, which highways cross it at right angles, and the blocks situated between the intersecting cross-streets are 200 feet in length, and the streets mentioned 60 feet in width; that the defendant owns two parallel tracks on First Street, the rails of each of which are placed 3 feet and 6 inches from center to center, and the space between the two tracks is 5 feet and 8 inches from center to center, of the rails; that the cars, which are operated by electricity, in going north run on the east track, and those proceeding in an opposite direction pass over the west line; that double-truck car No. 64, which struck the decedent, is 28 feet long, and 34 persons can be seated therein, but at the time of the injury there were on the car 53 passengers, a motorman and a conductor.

Price's testimony is to the effect that at the time of the accident he was standing, with others, at the northeast corner of First and Mill streets, awaiting the approach of a car going north, to become a passenger thereon; that he first saw Wolf going south on the west side of First Street and thence nearly across Mill Street, where he turned southeasterly to the south cross-walk on the latter street, and as he reached the west line of the rails the witness first saw the car up the hill coming down fast; that he did not hear any bell rung, nor was the speed of the car slackened; that when Wolf reached the east line of rails the car was about 50 feet south of Mill Street, and before he could cross the track he was struck and injured by the car, which passed entirely across the street before it was stopped. On cross-examination the following questions were asked, and responses thereto made:

“Q. Where was the car when you first saw it?

A. I saw it about Montgomery Street, as soon as it came up the hill. * * *

Q. Was it at Montgomery Street when you saw it first?

A. That is something I could not tell you.

Q. Will you swear it was as far up as Montgomery Street when you first saw it?

A. I could swear it was a block away when I seen it.

Q. Where was Mr. Wolf when you first saw the car?

A. He was on the first track—on the west track.

Q. When you first saw the car, Mr. Wolf was then on the west track, the one the cars run up on?

A. Yes; on the west track.

Q. And where was the car then? How far up?

A. A block.

Q. Up at Montgomery Street, one block away?

A. Yes.

Q. Was Mr. Wolf walking at a tolerably brisk speed, or was he going very slowly?

A. He was walking pretty briskly.

Q. And he walked right along all the time and did not stop?

A. Yes.

Q. You looked at him all the time?

A. Yes. * * *

Q. When Mr. Wolf came up the track, did you notice whether he looked up or down to see whether there was any car coming?

A. I noticed that he kind of looked in the beginning of his going on Mill Street. I noticed that when he went in on Mill Street—I noticed that when he went in to cross on Mill Street—he turned in and looked a little to see if any car was coming. * *

Q. Was there anything to obstruct his view, if he looked up the street from where he was?

A. Nothing in the way. It was uphill.

Q. There was nothing in your way?

A. Nothing in my way."

2. It is argued by defendant's counsel that Price's testimony is so opposed to all reasonable probabilities as to require its exclusion as a matter of law from the jury, leaving the case as it stood at the former appeal; and, this being so, errors were committed as alleged. There are certain facts of such general notoriety that they are assumed to be known by a court without any proof thereof (B. & C. Comp. § 719), and if the testimony of a witness transcends the laws of nature it is undoubtedly the duty of a court to withdraw such testimony from the consideration of the jury: *Smitson v. Southern Pac. Co.* 37 Or. 74 (60 Pac. 907). Thus, in *Blumenthal v. Boston & Maine Railroad*, 97 Me. 255 (54 Atl. 747), it was ruled that, when the undisputed circumstances show that the story told by a witness upon a material issue cannot by any possibility be true, it is incumbent upon the court to take such testimony from the jury. In that case the plaintiff was hurt by a collision with the defendant's train, after he had successfully crossed two of its tracks; and in referring to the circumstances of the injury, as detailed by the party suffering therefrom, Mr. Chief Justice WISWELL makes the following observation: "The plaintiff, according to his own testimony, was driving at a fast walk, and witnesses for the plaintiff testified that in their judgment the speed of the freight train was from 15 to 20 miles an hour. Assuming these estimates to be correct, when the plaintiff was upon the first track, with an unobstructed view of the railroad

easterly for a distance of between 300 and 400 feet, the train was only from 125 feet to 150 feet distant from the crossing, because the speed of the train was only five or six times that of the plaintiff, and they came into collision after the plaintiff had traveled a distance of 25 feet. Consequently, when the plaintiff was upon the first track, 25 feet distant from the place of collision, he had an unobstructed view of the approaching train, which was not more than 150 feet distant on the track from the crossing. If the relative speed of the freight train was not as great as the witnesses have estimated, then, of course, the train was still nearer the crossing at the time the plaintiff was upon the first track. There is no controversy about these facts. They are shown by the testimony introduced by the plaintiff, and by the plan which the plaintiff used and which is made a part of the case. From these facts one of these two conclusions is irresistible: Either the plaintiff failed to take such precautions as to looking and listening before attempting to cross the third track as have been laid down by all authorities as indispensable to his right of recovery, or else he did look and saw the approaching train, and took his chances of safely crossing in front of it. In either event his negligence contributed to the accident, and in accordance with the settled law of this state that negligence will prevent his recovery."

In *Spiro v. St. Louis Transit Co.* 102 Mo. App. 250 (76 S. W. 684), Mr. Justice GOODE, discussing the legal principle under consideration, remarks: "Verdicts resting on evidence which looks contrary to the ordinary course of nature are not infrequently set aside, and retrials directed, by appellate courts, as a proper precaution against an unjust outcome of litigation. While it is fundamental that juries must weigh evidence and trial judges revise their findings, instances happen in which, from one cause or another, this practice so obviously failed to work out a right result that an imperative call is heard to supplement it by an exceptional procedure in order that justice, the end of all procedure, may not be frustrated. This prerogative of courts of error is sparingly employed; but that

it exists, as an emergency expedient for the correction of verdicts palpably wrong, is certain. The appropriate use of it does not require a court to be convinced that the jury found an event to have occurred that was physically impossible or miraculous. It is enough if the event found was so improbable according to the ordinary operation of physical forces, or was so overwhelmingly disproved by credible witnesses, as to compel the conviction that the jury either failed to weigh the evidence carefully, or drew unwarranted inferences, or yielded to a partisan bias." So, too, in *Stafford v. Chippewa Valley Elec. R. Co.* 110 Wis. 331 (85 N. W. 1036), Mr. Justice MARSHALL, commenting upon the claim respecting the relative speed of a car and of a vehicle in which the plaintiff was riding, says: "The idea that the car moved from a point where it was out of sight from plaintiff's point of view when she looked to where it was when the horses became frightened, a distance of some 275 feet, while the horses traveled but about 20 feet, making the speed of the car somewhere about 50 miles per hour, or twice as great as the most extravagant testimony of plaintiff's witnesses puts it, is as well within the bounds of the ridiculous, we venture to say, as anything that has heretofore received serious consideration by a trial court or jury. We cannot believe for a moment that the learned trial court or the jury believed that such a thing could be within reasonable probabilities, or that the case was submitted to the jury upon any such theory."

3. The defendant's counsel, invoking the rule enunciated in the cases from which the foregoing excerpts have been taken, insist that, as it appears from Price's sworn statements Wolf passed from the west rail of the west track to a point about 12 inches east of the east rail of the east track, a distance of 13 feet and 8 inches, where he was struck by the corner of the car, while it was going from Montgomery Street to Mill, a space of 200 feet, shows that the car must have traveled more than 14 times faster than he did; and, assuming that Wolf walked at the moderate rate of 3 miles an hour, when the

witness said, "He was walking pretty briskly," demonstrates that the car was going at a greater rate of speed than 42 miles an hour, which conclusion is so improbable as conclusively to show that the testimony given by Price, as an attempt to establish a probative fact, is worthless, and should have been rejected as false, and hence an error was committed in denying the motion for a judgment of nonsuit. It was admitted at the trial that, though the streets where the accident occurred are 60 feet wide, the distance from curb to curb of such highways is only 36 feet, and, as Price was standing at the northeast corner of First and Mill streets, he must at least have been more than 36 feet north of where Wolf was at the time the latter was injured. It will be remembered that Price testified that when he first saw the car Wolf was by the west track, and that the car was then about at Montgomery Street. On cross-examination he was asked, "Was it at Montgomery Street when you saw it first?" and answered, "That is something I could not tell you." He further said, "I could swear it was a block away when I seen it." In reply to the inquiry, "Up at Montgomery Street, one block away?" he said, "Yes." If Price's last answer can be construed as definitely locating the car at Montgomery Street when Wolf had reached the west track, the inference which the defendant's counsel seek to establish from the testimony of this witness would seem to be deducible. The jury, however, who heard Price testify, may have observed that he did not give proper attention to that inquiry, and, if so, they had a right to compare and weigh his entire testimony, and were warranted in concluding that he intended to convey the idea that when he first saw the car it was about 200 feet from him, and therefore at least 36 feet nearer Wolf. If it were conceded that the car passed over 164 feet of track while Wolf was walking 13 feet and 8 inches, the car would necessarily have attained a velocity 12 times greater than that of the deceased, or 36 miles an hour, if he walked 3 miles in that time. Price's frequent use of the word "about," when employed to qualify the distance to which he referred, convinces

us that he did not intend definitely to locate the position of the car at any particular time with reference to Wolf's movements. If the rate of speed which the car acquired as it ran heavily loaded down an incline was definitely known, and Wolf's relative position with reference to it certain at all times until he was injured, it might be possible to determine whether or not Price's testimony violated the laws of nature; but in the absence of such information we believe a fair construction of his sworn statements shows that they are not so improbable as to have warranted a declaration by the trial court, as a matter of law, that his testimony was unworthy of belief.

In *Blumenthal v. Boston & Maine Railroad* and in *Stafford v. Chippewa Valley Elec. R. Co.*, to which cases reference has hereinbefore been made, there was no conflict of testimony as to the rate of speed of the train and car respectively causing the injury, while in the case at bar that question is controverted. In order clearly to understand this branch of the subject, a statement of the defendant's theory of the cause and manner of the injury is deemed appropriate. No witness was called at the last trial by the defendant, but its counsel read to the jury the testimony given on behalf of their client at the prior hearing. This evidence is set out with some particularity in the former opinion (*Wolf v. City Ry. Co.* 45 Or. 446: 72 Pac. 329, 78 Pac. 668), and may be thus summarized: As the car was going north about 10 o'clock in the forenoon of August 26, 1902, which was a dry day, Wolf was seen crossing First Street, at the south line of Mill, whereupon the motorman immediately rang the bell and applied the brakes, checking the speed of the car from 8 or 10 miles an hour to 3 or 4, during that period of time; that when Wolf reached the west track, where his view was unobstructed, he halted as if to permit the car to pass, and the motorman then released the brakes and the car started ahead, but when it was within about 7 or 8 feet south of the crossing Wolf suddenly attempted to pass in front of it, whereupon the brakes were firmly applied, but the motorman was unable to stop the car in time to prevent the

accident, or until the front trucks had just passed over the north crossing of Mill Street. C. F. Swigert, who was, and for several years prior to the accident had been, the manager of the defendant corporation, testified, as its witness, that he was acquainted with the practical working of an electric car and knew the manner of stopping one, and that, in his opinion, the shortest distance in which such a car could be stopped that was running at the rate of 6 miles an hour was 30 feet, at 8 miles an hour 40 feet, and at 10 miles an hour 50 feet. Joseph Friedman, as plaintiff's witness, testified that after striking Wolf the car was not stopped until its rear end was about two lengths of the car, or 56 feet, north of Mill Street. Joseph Ruvensky, testifying for the plaintiff, said the car passed entirely across that street before it was stopped. Mrs. Alice Walker, as a witness for the same party, testified that the car was stopped below the crossing. Mrs. Mary Park, as the defendant's witness, testified that she was a passenger on the car at the time Wolf was injured, and on cross-examination, in referring to the place where the car was stopped after the accident, she stated, "I think it was about the middle of the block, or across over the crossing."

Assuming the fact most strongly against the plaintiff, that her husband was struck while he was at the extreme north line of the south cross-walk of Mill Street, the car ran across the remainder of that highway, or 48 feet, and if Friedman's testimony is to be believed the front end of the car, which was the line of contact, was not stopped until it had gone three times the length of the car, or 86 feet, below the crossing, thus making the entire distance, according to his estimate, 132 feet over which the car passed before it was stopped after causing the injury. If Mrs. Park's opinion is accepted, however, the intervening space over which the car passed after the accident, before it could be stopped by the motorman, who testified that he set the brakes as hard as he could, was 148 feet. As the speed of a car may reasonably be determined by the distance which it covers on the rails before it can be stopped, when the brakes

are properly applied, and as the rate per hour is ascertained, as explained by Swigert, who is an expert in such matters, to be equivalent to one-fifth of such distance, the jury were authorized to infer from the testimony admitted that the car was running at the rate of 26.4 or 29.6 miles an hour when the injury occurred, and that in the management of the instrumentality the defendant's agents and servants were negligent: *Marden v. Portsmouth, K. & G. St. Ry. Co.* 100 Me. 41 (60 Atl. 530: 69 L. R. A. 300: 109 Am. St. Rep. 476); *Chisholm v. Seattle Electric Co.* 27 Wash. 237 (67 Pac. 601). Such deduction, when compared with Price's testimony, convinces us that no error was committed in submitting his sworn statements to the jury for their consideration. We are confirmed in this view by the testimony of Joseph Ruvenky, who, having stated that, at the time of the accident, he was on the west side of First Street going north; that he heard the car back of him, and at the same time saw Wolf crossing the south side of that street, was asked, "When you first saw Mr. Wolf at that time, how far up the street were you on the west side?" and he replied, "I was about half a block." On cross-examination, the defendant's counsel, referring to Wolf, inquired, "How far was he from the curb on the west side when you first saw him?"

The witness answered:

"The first time I saw him, he was at the first track, passing. * *

Q. How many steps did he take before the car came in sight?

A. He was crossing. He was in the middle of the track, and crossing the tracks.

Q. That is the position he was in when the car passed you?

A. When the car passed me I did not see him.

Q. You did not see the car pass you?

A. I saw the car pass, but I did not see Mr. Wolf at that time.

Q. How far was the car from the crossing when it passed you?

A. The car was about three houses from the baker shop.

Q. Then that was three houses above the baker shop, and the

baker shop and another house on the corner, so that would make it about five houses. The car was about five houses away?

A. Yes."

4. In referring to the testimony last quoted, the defendant's counsel make the following statement in their brief, to wit:

"The usual width of houses is 16 feet, which would place him (Ruvensky) 80 feet from the corner, where he saw Wolf crossing the track, when the car was so far behind him and up the street that he could not see it without looking around, nor did he see it until it afterwards passed him. Now, if the car was running at the rate of speed to which he testified, it must have been at least 30 feet further back, which would place the car not less than 100 feet from the crossing where Wolf was seen by Ruvensky in the act of crossing."

No testimony was offered tending to show the width of the houses mentioned, nor did Ruvensky indicate the rate of speed which the car attained, except to state that it was going fast, and that it was about two seconds after it passed him before Wolf was struck by it. It is impossible accurately to determine from Ruvensky's testimony how far south of Mill Street the car was when he first saw Wolf, or how far the witness was at that time from the street corner, except his estimate as to the latter distance, that it was about half a block, or 100 feet, and the car still further behind him. "A person about to cross a street at a regular crossing," says Mr. Justice FELL, in *Callahan v. Philadelphia Traction Co.* 184 Pa. 425 (39 Atl. 222), "is not bound to wait because a car is in sight. If a car is at such a distance from him that he has ample time to cross if it is run at the usual speed, it cannot be said as a matter of law that he is negligent in going on." So, too, in *Philbin v. Denver City Tramway Co.* 36 Colo. 331 (85 Pac. 630), Mr. Justice MAXWELL, in speaking of the measure of care demanded from a traveler on a public highway, asserts: "It is not negligence *per se* for one to cross a street railway track in front of an approaching car, which he has seen and which is not dangerously near." If the jury believed the testimony of Ruvensky and of Price, they had the right to conclude that the approach-

ing car was not dangerously near when Wolf attempted to cross the tracks in front of it, and they also had the right to find, from the testimony of plaintiff's witnesses, that the gong was not sounded, nor any effort put forth to check the speed of the car.

5. No ordinance limiting the rate of speed of a street car in Portland having been offered in evidence, nor any testimony produced tending to show what is the standard of legitimate speed for an electric car on First Street in that city, Mr. Seabrook, of counsel for the defendant, called attention at the trial to the case of *Yingst v. Lebanon & A. St. Ry. Co.* 167 Pa. 438 (31 Atl. 687), as establishing the rule governing the case at bar. In that case the plaintiff was injured by the upsetting of a wagon in which she was riding, occasioned exclusively by the fright of the horse which was drawing the vehicle. The negligence alleged was that the car was running at an excessive rate of speed, which caused the fright of the animal and thereby occasioned the injury. In rendering the decision, Mr. Justice GREEN, speaking for the court, in referring to the plaintiff's witnesses, says: "Not one of them was even asked the question whether the speed of the car was greater than was allowable for an electric car to run, or whether they had any knowledge upon that subject. No experts in such matters were called to testify as to what would be a reasonably prudent rate of speed for such a car over such a street, and, in short, no evidence whatever was given upon that subject. Nor was any evidence given for the plaintiff as to the actual rate of speed at which this car was run, and therefore the plaintiff did not furnish any proof which could guide the jury in considering whether the defendant was guilty of any negligence in this regard." Further in the opinion it is observed: "Electric cars have a lawful right to go 'fast'—to go with 'speed.' The fact that they can do so is one of the great reasons of their being. When a witness says, therefore, in a given case, that the car ran swiftly or with speed, he says nothing to the purpose when the inquiry is as to negligence in the rate of travel. Such testimony is

altogether too uncertain for judicial action, and most especially so when there was no collision, but only the fright of a passing horse." In *Harkins v. Pittsburg, A. & M. Traction Co.* 173 Pa. 149 (33 Atl. 1045), it was held that the rule thus announced was not applicable where a person was injured by being struck by a car. The court, referring to the legal principle invoked, say: "The circumstances of the two cases are not alike, and the degree of care required was not the same. In one case the speed of the car was wholly unimportant, except as it contributed to causes which produced an unexpected result, the fright of the horse; in the other, the rate of speed was of primary importance, as indicating the degree of control which the motorman exercised over the movements of the car in a crowded street, and when in a position demanding a high degree of care." It is incumbent upon a street railway company, in operating its cars at public crossings, to use ordinary care to avoid injury; that is, such a degree of solicitude for the welfare of others as persons of average prudence would exercise, in view of the danger reasonably to be apprehended and of the consequences of accidents resulting therefrom.

6. Excessive speed at such places augments the danger of collision with travelers, and, as it might reasonably have been inferred from the testimony produced at the trial that at the time of the accident the car causing the injury was running at a rate of 26 or 29 miles an hour, the court could not say, as a matter of law, that the speed was reasonable, and hence it was its duty to submit that question to the jury for their consideration: *Davis v. Concord & M. R.* 68 N. H. 247 (44 Atl. 388). The rule thus announced is applicable in thickly populated or much-used districts, regardless of the fact whether or not a statute has been enacted or a municipal ordinance adopted limiting the rate of speed: *Sundmaker v. Yazoo & M. V. Ry. Co.* 106 La. 111 (30 South. 285).

7. Though the accident occurred in the City of Portland, no testimony was offered tending to show the number of people who lived in the vicinity of First and Mill streets, or to esti-

mate the persons who might reasonably be expected to cross the defendant's tracks at that intersection. It does appear, however, that at the time of the injury seven persons were on the street at or near the crossing, and from that number the jury had the right to infer that the highway was much used.

8. In *Golinvaux v. Burlington, C. R. & N. Ry. Co.* 125 Iowa, 652 (101 N. W. 465), it was ruled that, in the absence of an ordinance regulating the rate of speed, a train running in the suburbs of a city across a street at the rate of 60 or 65 miles an hour was not of itself negligence, but was a circumstance to be submitted to the jury, with other evidence tending to show that the view of a traveler was obstructed at that crossing and that no bell was rung. Whether or not such excessive velocity of a train in the outlying districts of a city is not *per se* negligence, even in the absence of a municipal ordinance regulating the rate of speed, need not now be considered; for the principles of law governing the management of trains propelled by steam power and regulating cars operated by electricity are not identical: *Marden v. Portsmouth, K. & Y. St. Ry. Co.* 100 Me. 41 (60 Atl. 530: 69 L. R. A. 300: 109 Am. St. Rep. 476). In that case it was determined that the rule promulgated in *Blumenthal v. Boston & Maine Railroad*, 97 Me. 255 (54 Atl. 747), hereinbefore noted, was not applicable. We conclude, therefore, that the rule invoked is not appropriate to the case at bar, and that Wolf, when he attempted to cross the street, had the right to assume that the car, which was at such a reasonable distance, would permit him to do so, if run at the usual rate of speed (*Hamilton v. Consolidated Traction Co.* 201 Pa. 351: 50 Atl. 946); and hence no error was committed in refusing to instruct the jury to find for the defendant.

9. It is maintained by defendant's counsel that the judgment given is excessive, and for that reason an error was committed in refusing to set the verdict aside and to grant a new trial. In *Lindsay v. Grande Ronde Lum. Co.* 48 Or. 430 (87 Pac. 145), it was ruled that the refusal of a trial court to set aside a verdict as excessive could not be reviewed on appeal,

as the question presented was one of fact, and not of law.

Other errors are assigned; but, deeming them unimportant,
the judgment is affirmed. AFFIRMED.

Argued 21 March, decided 14 May, rehearing denied 27 Sept. 1907.

MYER v. ROBERTS.

12 L. R. A. (N. S.) 194; 89 Pac. 1051.

LANDLORD AND TENANT—ASSIGNABILITY OF CROP LEASE.

1. A lease providing for the possession and cultivation of ground, and re-
services not possessed by agriculturists generally, is a personal con-
tract and not assignable, except by consent, without working thereby a for-
feiture of the lease.

SAME—RIGHT TO CROP AFTER RE-ENTRY.

2. A landlord who lawfully re-enters upon leased property is entitled to
the crops that were growing at that date, as they pass with the possession.

SAME—RETAINING POSSESSION UNLAWFULLY.

3. A tenant who secures and maintains possession of land by an injunction
wrongfully issued after the landlord had lawfully obtained possession for con-
dition broken by such tenant, is not entitled to the crop harvested by him
during the continuance of the restraint, on the theory that a landlord out of
possession is not entitled to annual crops grown by an occupant and by him
severed from the soil.

SAME—RECEIPT OF CROP AS RECOGNITION OF TENANCY.

4. The receipt by a landlord of part of a crop grown upon the leased land
by the occupant thereof is not evidence of the relation of landlord and tenant,
where the occupant's right to possession was consistently denied and the part
of the crop tendered was received under a claim of title to the whole.

From Marion: GEORGE H. BURNETT, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action in trover by J. W. Myer against John J. Roberts and T. A. Livesley for the conversion by defendants of 21,913 pounds of hops alleged to belong to the plaintiff. The facts are these: On March 7, 1900, I. M. Simpson, being the owner of a hop yard in Polk County, leased it, with the improvements, certain farming implements and personal property, to the defendants for the years 1900 to 1904, inclusive. On October 25, 1902, the defendants sublet the yard on shares to W. D. Huston for the years 1903 and 1904. On January 15, 1904, Huston attempted to assign and transfer his contract to the plaintiff. On January 23, 1904, the defendants, without notice

of the assignment, entered into a new lease with Huston for the current year, taking from him a mortgage on his interest in the crop to secure a balance due for advances made the previous year and to be thereafter made. It was stipulated that in case of a violation of the terms of the lease defendants could re-enter, take possession of the property, complete the cultivation of the yard, harvest and sell the hops, paying over the surplus, if any, to Huston.

At the time of the attempted assignment by Huston to plaintiff there was no one in actual possession of the hop yard, and no dwelling thereon. A few days later the plaintiff went to examine the yard, but finding it too wet to work returned home. His brother, whom he had employed to cultivate the yard for him, returned about the 4th of February and remained a few days, but as the weather was unfavorable, but little, if any, work was done by him. On the 14th of March defendants, learning that the plaintiff claimed some right to the yard, sent one Vincent, an employee of theirs, to take possession and cultivate it for them. Vincent found no one in actual possession at the time, but some of plaintiff's employees arrived either that afternoon or the next morning, and they and Vincent were in joint occupancy until the latter part of March, when plaintiff commenced a suit to enjoin and restrain defendants from interfering with his possession. A preliminary injunction was issued and served, in obedience to which Vincent left the premises. On June 27, 1904, a decree was entered in such suit to the effect that the assignment from Huston to plaintiff was valid and entitled him to possession during the time specified therein, but that defendants had a lien on the crop to secure the payment of \$625 by virtue of their contract with Huston. This decree was reversed in November, 1904, and the complaint dismissed, on the ground that the contract between Huston and the defendants was unassignable: *Meyer v. Livesley*, 45 Or. 487 (106 Am. St. Rep. 667; 78 Pac. 670). Pending the litigation, however, the plaintiff remained in possession, cultivated and harvested a crop from the yard, one-fourth of which

he delivered to the defendants, and stored the remainder in a near-by warehouse, where it was afterwards taken by defendants and converted to their own use. The purpose of this action is to recover the value of the hops so converted. The court below directed a verdict for defendants and the plaintiff appealed.

AFFIRMED.

For appellants there were oral arguments by *Mr. John H. McNary* and *Mr. Chas. L. McNary* with a brief to this effect.

I. Hops growing on vines produced annually by industry and cultivation are regarded as *fructus industriales* and personal property, though the root of the vine is perennial, living for a series of years: 8 Am. & Eng. Enc. Law (2 ed.), 302, 303; Tiedeman, Real Prop. § 70.

II. One who sows, cultivates and harvests a crop upon the land of another is entitled to the crop as against the owner of the ground, whether he came into the possession of the land lawfully or not, provided he remains in possession until the crop is harvested: *Page v. Fowler*, 39 Cal. 412 (2 Am. Rep. 462); *Martin v. Thompson*, 62 Cal. 618; *Huerstal v. Muir*, 64 Cal. 450 (2 Pac. 33); *Groome v. Almstead*, 101 Cal. 425 (35 Pac. 1021); *Johnston v. Fish*, 105 Cal. 420 (45 Am. St. Rep. 53: 38 Pac. 979); *Dollar v. Roddenbery*, 97 Ga. 148 (25 S. E. 410); *Lindsay v. Winona & St. P. R. Co.* 29 Minn. 411 (43 Am. Rep. 228: 13 N. W. 191); *Boyer v. Williams*, 5 Mo. 335 (32 Am. Dec. 324); *McAllister v. Lawler*, 32 Mo. App. 91; *Edwards v. Eveler*, 84 Mo. App. 405; *Morgner v. Biggs*, 46 Mo. 65; *Harris v. Turner*, 46 Mo. 438; *Jenkins v. McCoy*, 50 Mo. 348; *Adams v. Leip*, 71 Mo. 597; *Brothers v. Hurdle*, 32 N. C. (10 Ired. L.) 490 (51 Am. Dec. 400); *Ray v. Gardner*, 82 N. C. 454; *Faulcon v. Johnston*, 102 N. C. 264 (11 Am. St. Rep. 737: 9 S. E. 394); *Hinton v. Walston*, 115 N. C. 720 (20 S. E. 164); *Stockwell v. Phelps*, 34 N. Y. 363 (90 Am. Dec. 710); *Phillips v. Keysaw*, 7 Okl. 674 (56 Pac. 695); *Kirtley v. Dykes*, 10 Okl. 16 (62 Pac. 808); *Churchill v. Ackerman*, 22 Wash. 227 (60 Pac. 406); *Cullen v. Bowen*, 36 Wash. 665 (79

Pac. 305); 12 Cyc. p. 977; 8 Am. & Eng. Enc. Law (2 ed.), 329; 8 Ballard, Real Property, § 99.

For respondents there were oral arguments by *Mr. William Marion Kaiser* and *Mr. Wirt Minor*, with a brief over the names of *Wm. M. Kaiser*, *Woodson T. Slater* and *Teal & Minor*, to this effect.

1. When a mere intruder upon lands plants crops thereon, such crops, so long as they remain unsevered, are the property of the land owner (12 Cyc. 977), and where a landlord re-enters for breach of a condition in a lease, he is immediately invested with the title to the premises and the emblements growing thereon: 2 Taylor, Land. & Ten. (9 ed.) § 535; 8 Am. & Eng. Enc. Law (2 ed.), 319; *Samson v. Rose*, 65 N. Y. 411; *Smith v. Reeder*, 21 Or. 541 (15 L. R. A. 172: 28 Pac. 890).

2. A trespasser who sows, cultivates and harvests a crop upon the land of another, and against the opposition and protests of the owner, has no right to such crop, even if he has cut and gathered it: *Crotty v. Collins*, 13 Ill. 567; *Simpkins v. Rogers*, 15 Ill. 397; *Samson v. Rose*, 65 N. Y. 411; *Wadge v. Kittleson*, 12 N. D. 452 (97 N. W. 856); *Freeman v. McLennan*, 26 Kan. 151; *Rowell v. Klein*, 44 Ind. 290 (15 Am. Rep. 235); *McLean v. Bovee*, 24 Wis. 295 (1 Am. Rep. 185); *McGinnis v. Fernandes*, 135 Ill. 69 (25 Am. St. Rep. 347: 26 N. E. 109); *Lindsay v. Winona & St. P. R. Co.* 29 Minn. 411 (43 Am. Rep. 228: 13 N. W. 191); *Thomes v. Moody*, 11 Me. 139.

3. Receipt of rent after a landlord has actually commenced his action of ejectment for a forfeiture does not amount to a waiver: Taylor, Land. & Ten. (1 ed.) § 497; 1 Wood. Land. & Ten. 324.

Opinion by MR. CHIEF JUSTICE BEAN.

1. The lease or agreement between the defendants and *Huston* for the possession and cultivation of the hop yard for the years 1903 and 1904 was a personal contract and not assignable to a third person without consent of defendants. An

attempt to make such an assignment would work a forfeiture of Huston's interest and give the defendants an immediate right of re-entry: *Meyer v. Livesley*, 45 Or. 487 (106 Am. St. Rep. 667: 78 Pac. 670); *Randall v. Chubb*, 46 Mich. 311 (41 Am. Rep. 165: 9 N. W. 429). When, therefore, Huston undertook to assign his interest to the plaintiff and put the latter in possession it worked a forfeiture of the agreement and authorized the defendants to immediately re-enter and take possession of the property.

2. The evidence shows they did this in a peaceable and orderly manner on March 11th, and were thereby restored to possession: *Smith v. Reeder*, 21 Or. 541 (15 L. R. A. 172: 28 Pac. 890). At that time the hop roots had sprouted and were growing, and upon re-entry by the defendants the title thereto vested in them. When the estate of a tenant or occupant of land is forfeited, or the tenancy terminated by some act of his, and the landlord or owner re-enters, the tenant or occupant is not entitled to the crops growing thereon, but they pass to the landlord with the title to the land: 8 Am. & Eng. Enc. Law (2 ed.), 319; Taylor, Land. & Ten. § 535; *Samson v. Rose*, 65 N. Y. 411. This latter case is much in point. In that case the plaintiff leased his farm to Tripp & Greene for five years for an annual rent, payable in January of each year. There was a clause authorizing the re-entry of the lessor in case the rent was not so paid. Tripp & Greene did not pay the rent due in January, 1870, and on March 20th thereafter the plaintiff brought an action in ejectment to recover possession of the premises, and in due time recovered judgment, and was put in possession. Pending the litigation Tripp & Greene sublet the premises to the defendant, who raised a crop of grain from seed sown after the commencement of ejectment proceedings, which had been cut but not removed from the land at the time plaintiff was put in possession under the judgment in ejectment. The question in the case was as to the title to such grain. The court held that it belonged to the plaintiff, because under the statute the commencement of the ejectment proceeding was

equivalent to a re-entry on the demised premises for condition broken, thus applying the doctrine alluded to that an entry by a landlord for condition broken vests in him the title to growing crops.

The principle of that case seems to us controlling here. Indeed, the case at bar is much more favorable to the defendants on its facts than the one cited. In this case there was an actual re-entry by defendants while the crop was growing and unharvested; while in the New York case the re-entry was constructive. Again, in this case the crop was growing on the premises at the time of the re-entry; while there, seed was planted after the constructive re-entry. The judgment was not unanimous in the New York case, but the judges all agreed as to the general principle of law: that an actual re-entry by a landlord for condition broken vests him with title to all growing crops on the land; but they differed as to whether the commencement of an action of ejectment was equivalent to such re-entry,—a question that does not arise in this case.

3. The plaintiff relies for recovery upon the general doctrine that the owner of land out of possession is not entitled to annual crops grown and severed from the soil by an occupant: *Page v. Fowler*, 39 Cal. 412, 416 (2 Am. Rep. 462); *Groome v. Almstead*, 101 Cal. 425 (35 Pac. 1021); *Martin v. Thompson*, 62 Cal. 618; *Jenkins v. McCoy*, 50 Mo. 348; *Adams v. Leip*, 71 Mo. 597; *Ray v. Gardner*, 82 N. C. 454; *Faulcon v. Johnston*, 102 N. C. 264, 267 (11 Am. St. Rep. 737: 9 S. E. 394); *Stockwell v. Phelps*, 34 N. Y. 363, 364 (90 Am. Dec. 710); *Phillips v. Keysaw*, 7 Okl. 674 (56 Pac. 695); *Kirtley v. Dykes*, 10 Okl. 16 (62 Pac. 808); *Churchill v. Ackerman*, 22 Wash. 227 (60 Pac. 406); 8 Ballard, Real Prop. § 99. But we think this rule cannot apply to one who secures and maintains possession by an injunction wrongfully issued after a landlord has lawfully re-entered for condition broken. The plaintiff never was in the exclusive possession of the premises, except by virtue of the injunction, either in his capacity as the assignee of Huston or in any other capacity. At most,

his possession was joint with that of the defendant and both were engaged in cultivating hops until the time of the injunction. It takes something more than such a holding to constitute an occupant within the meaning of the rule invoked by plaintiff. Because he was able by reason of the injunction to crop the land without license and against the protest of the defendants does not give him a legal title to the crop growing thereon at the time of his entry. His act was without right or authority, and at his peril, and he must suffer the consequences. If he thought himself wronged by the refusal of the defendants to recognize the assignment from Huston he should have resorted to an appropriate action to recover damages and not insisted on remaining in possession by means of an injunction.

4. It is claimed that the delivery to and acceptance by the defendants in October, 1904, of a part of the hops raised on the yard during that year is *prima facie* evidence of the relation of landlord and tenant, and sufficient to take the case to the jury on that point. As a general rule the payment of rent by one in occupancy of premises is evidence of a tenancy, but not when paid under such circumstances as to rebut such an idea: Wood, Land. & Ten. § 4; Taylor, Land. & Ten. § 3. It clearly appears that defendants did not receive or accept the hops delivered to them by plaintiff with any intention of recognizing plaintiff as their tenant, but because they claimed title to all the hops grown in the yard. They had denied plaintiff's right to possession from the beginning and were at the time of the delivery litigating that question with him; and it would be inconsistent with their entire attitude throughout the proceedings, and all the circumstances of the case, to give to the mere fact of the receipt by them of a part of the hops the effect of evidence of a tenancy.

It follows that the judgment of the court below must be affirmed, and so ordered.

AFFIRMED.

KRAUSE v. OREGON STEEL CO.

91 Pac. 442, 92 Pac. 810.

WHAT DECREE IS ENFORCEABLE AFTER APPEAL AND AFFIRMANCE—
JURISDICTION TO MODIFY AFTER MANDATE.

1. After an equity case has been tried on appeal and the mandate of the supreme court with the appropriate decree entered in the trial court, the original decree ceases to have any force, the decree ordered by the appellate court takes its place, and the latter is not subject to any change or modification by the circuit court.

APPEAL—RIGHT OF SUPREME COURT TO MODIFY DECREE AFTER CLOSE
OF TERM.

2. The rule that by the lapse of the term a court loses jurisdiction of a cause in which a final order has been entered applies to the supreme court as well as to the circuit courts, and after the term the only power remaining in the supreme court is to recall the mandate for the purpose of correcting an error of the court, to settle the cost bill, or to determine some matter relating to the enforcement of the decree; there is no power to modify the decree or judgment in its essential features,

From Clackamas: THOMAS A. MCBRIDE, Judge.

Suit by August Krause against the Oregon Iron & Steel Co., in which the decree of the supreme court was entered in 1904 in the trial court. Defendant moved the circuit court to correct this decree, which that court refused to do, whereupon petitioner appealed. This is the first matter here reported, and the decision of the trial court was affirmed. The defendant then applied directly to the supreme court to recall the mandate, which is the second matter reported, and the motion was denied. Both opinions are reported under one title.

AFFIRMED: MOTION DENIED.

Decided 20 August, 1907.

ON APPEAL FROM ORDER REFUSING TO MODIFY DECREE
ENTERED ON MANDATE.

91 Pac. 442.

For appellant there was a brief over the name of *Williams, Wood & Linthicum*, with an oral argument by *Mr. Stewart Brian Linthicum*.

For respondent there was a brief with an oral argument by *Mr. Cicero Milton Idleman*.

Opinion by MR. JUSTICE EAKIN.

1. This cause was tried in the lower court in June, 1901, and appeal taken from the decree therein, and on August 8, 1904, decree was rendered in this court (*Krause v. Oregon Steel Co.* 45 Or. 378: 77 Pac. 833), which, upon mandate, was entered in the lower court. Afterward, on May 12, 1905, the defendant, by motion and affidavits, applied to the lower court to have an execution theretofore issued on said decree recalled, and for an order interpreting and modifying, or correcting, said decree in accordance with equity and the intention of that court. The lower court denied the motion, for the reason that it was without jurisdiction to entertain it, from which this appeal is taken.

Counsel for the defendant insists that the lower court had jurisdiction to hear and determine the motion, as it only called for a correction of the decree of that court. The vice of this position is: Counsel assumes that, as the decree below was affirmed in this court, it rests now upon the original decree entered by the lower court; but it is not now the decree of the lower court, except for purposes of enforcement. The cases cited by counsel for defendant in support of its motion only discuss the power of the court over its judgments after the adjournment of the term at which they were rendered, viz., corrections of clerical errors and *nunc pro tunc* entries to make the judgment conform to that pronounced by the court; but they can have no application in such a case as this, and are not authority as to the power of the circuit court to modify a decree of the supreme court, which, upon mandate, is entered there.

In *Welch v. Keene*, 8 Mont. 305 (21 Pac. 25), cited by defendant, the appeal was dismissed, which left the original decree rendered in the court below the decree in the case unaffected by the appeal, and is therefore not in point. Elliott, Appellate Procedure, § 576, says: "No modification of the judgment or decree directed by the appellate tribunal can be made by the trial court. No provision can be ingrafted upon it, nor can any be taken from it." And in Section 579, in speaking

of affirmance of judgments at law, he says: "This confirmation operates to a limited extent as a merger, inasmuch as it concludes the trial court and the parties, and absolutely precludes them from modifying or abrogating the judgment affirmed. The authority of the trial court as to all matters involved in the appeal and adjudicated by the judgment there rendered is at an end." In the case at bar, after findings and decree by the lower court, the suit was appealed, and the cause tried anew here upon the law and facts. This court rendered its own decree thereon, which, upon mandate of this court, was entered in the lower court for enforcement, and the original decree rendered by the circuit court thereby became *functus officio*, and the decree of this court is final, and not within the power of the lower court to change or modify. Therefore the lower court was without jurisdiction to entertain the motion, and the order denying it is affirmed.

AFFIRMED.

Decided 17 December, 1907.

ON MOTION TO RECALL MANDATE.

92 Pac. 810.

Mr. Stewart Brian Linthicum and Mr. John Couch Flanders for the motion.

Mr. Cicero Milton Idleman, contra.

Opinion by MR. JUSTICE EAKIN.

This suit was commenced November 6, 1897, for the purpose of enjoining defendant from maintaining a dam in the Tualatin River. The decree of the lower court therein was affirmed by this court on August 15, 1904: *Krause v. Oregon Steel Co.* 45 Or. 378 (77 Pac. 833). The decree of the lower court provides that the dam be abated;

"save and except that portion thereof which extends from the lowermost part of said dam upwards to a height of 24 inches, that is to say * * excepting the lower 24 inches thereof beginning from the lowermost portion thereof."

This court (opinion by Mr. Justice WOLVERTON), after a thorough review of the evidence, grants a similar decree, and it is claimed now by this motion that the decree of the lower court was intended to permit the dam to be maintained to such height as would raise the water two feet above low water. The fifth finding of fact by the lower court is in the following words:

"That said dam can be maintained at a height of 24 inches above the lowermost portion thereof without injury or damage to the lands of plaintiff, and that the injury above mentioned has been caused by erecting and maintaining said dam to a height of more than 24 inches above the lowermost portion thereof."

Thus a decree for a dam of greater height would not have been supported by the findings. Mr. Justice WOLVERTON finds as facts that the dam was built of sawed timbers, 12x12 inches, placed one above the other, and, at the time of the trial, consisted of three tiers of such timbers, with a decking of about four inches, and that this created the damage complained of; and he finds that this dam would create some rise in Rock Creek, upon which plaintiff's lands are situated—from a foot to a foot and a half above its normal condition—and then says: "At what particular height it can be maintained without injuring him is not so clear. Relatively speaking, a two-foot dam would affect Rock Creek but slightly, and we entirely agree with the judgment of the learned trial court that it ought to be abated to that height from the lowermost portion of the bed of the stream." Thus it will be seen that the decree reduces the dam only by removing from it one timber and the decking as it stood at the time of the trial. It is also plain that no change can be made in the decree without a retrial of the suit; nor are we convinced that a retrial would result differently.

2. The supreme court, equally with other courts, is subject to the rule that a court loses jurisdiction of a cause in which final decree has been rendered by lapse of the term. It has power after the term to recall the mandate to correct a misprision of the clerk, settle the cost-bill, or to determine any

other matter relating to its enforcement, but not to qualify or modify that which the court has once finally determined: 1 Black, Judgments, 153, 154; *Harvey's Heirs v. Wait*, 10 Or. 117; *Dray v. Bloch*, 29 Or. 347 (45 Pac. 772). The relief sought here is not to make the entry conform to the decree actually rendered, but to change its substance and effect, and is beyond the power of the court; and the motion to recall the mandate is denied. AFFIRMED: MOTION DENIED.

Argued 2 July, decided 20 August, 1907.

OLIVER v. NEWBERG.

91 Pac. 470.

MUNICIPALITY—CHANGING COUNTY ROADS TO STREETS.

1. When a city proceeds to act under a charter authorizing it to open, work and control all highways and roads within the corporate limits, and excepting that territory from the jurisdiction of the county court, and expressly vesting in the city control of the roads within its boundaries, it thereby accepts the relinquishment of the county court over such roads and the latter thereby become city streets and are thereafter subject to the burdens of streets: *Heiple v. East Portland*, 13 Or. 97, distinguished.

SAME—LEGISLATIVE INTENTION.

2. Whether a county road becomes a street when included within a city's corporate limits depends upon the intention of the legislature, as gathered from the city charter, general laws and the whole course of legislation on the subject.

STREETS—DEDICATION BY SALE OF PLATTED LOTS.

3. A sale of lots with reference to a plat showing a street is sufficient to complete a dedication of such street, subjecting it to any new servitude incident to it as a street.

VALIDITY OF STREET ASSESSMENT.

4. Under the provisions of the charter of Newberg the scheme for assessing the cost of street improvements is a pro rata one on all the lots involved according to frontage.

From Yamhill: WILLIAM GALLOWAY, Judge.

Statement by MR. JUSTICE EAKIN.

This is a suit brought by A. P. Oliver and others against the City of Newberg and others to enjoin the collection of an assessment of the expense of a street improvement upon abutting property. The street improved is known as "First Street," and was originally a county road, laid out by Yamhill County prior to the platting of any part of the City of Newberg and

prior to its incorporation. The town was originally incorporated in 1889, and afterward, in 1893, a new act of incorporation was passed, repealing the old one. In the re-enactment of 1893 the charter excepts out of the jurisdiction of the county court of Yamhill County all the territory within the city for road purposes or taxation therefor, and grants to the city the full control of all county roads within its jurisdiction. In the year 1905 the said city, by virtue of the terms of its charter with reference to the improvement of streets, proceeded to grade, gravel and erect a curb on either side of said First Street for a distance of nine blocks, and, after the completion of said improvements, ascertained the expense of grading and graveling to be \$4,449, and of the curb 45 cents per lineal foot. The city then proceeded to assess the said expense, less the street intersections, to the abutting property along the said street *pro* according to the frontage. On trial of the suit, the findings were in favor of defendants, and the suit dismissed; and the plaintiffs appeal.

AFFIRMED.

For appellants there was a brief over the names of *Martin Luther Pipes* and *McCain & Vinton*, with oral arguments by *Mr. Pipes* and *Mr. James McCain*.

For respondents there was a brief over the names of *Richard Ward Montague*, and *Clarence Butt*, with an oral argument by *Mr. Montague*.

Opinion by MR. JUSTICE EAKIN.

The plaintiffs seek to avoid liability for said assessment upon the ground that the said alleged First Street is a county road, and abutting property is not subject to the expense of the improvements thereof under the city charter, and that, if liable, the city should have assessed to each lot only the expense of the improvement of the half street abutting thereon. The issues as to the manner in which improvements were made and the character of the material used thereon are waived by the plaintiffs. Questions for consideration therefore are: Is the so-called First Street a street within the meaning of the char-

ter authorizing such improvements? And, if so, was the manner of the assessment of the expense of the improvement against the adjacent property within the authorization of the charter?

1. By the charter of 1893 the City of Newberg was created, the boundaries of which included the street in question; and by Section 139 it is provided:

"The City of Newberg, as created by this act, shall have full power to lay out, open, work, change and control all the highways and roads within the corporate limits thereof, and the inhabitants of said city within said limits, and all property therein shall be exempt from the payment of road taxes of any and every kind to the County of Yamhill. * * For the purpose mentioned in this section, the territory within the limits of the City of Newberg is excepted out of the jurisdiction of the county court of Yamhill County, Oregon, and full control of all roads and highways, or parts thereof, within the corporate limits of said city is hereby vested in the City of Newberg": Laws 1893, pp. 282, 316.

When the city proceeded to act under the charter of its creation, it thereby accepted the relinquishment and grant of all county roads within its territory, and *ipso facto* they became streets. In *Heiple v. East Portland*, 13 Or. 97 (8 Pac. 907), cited by plaintiffs' counsel as holding contrary to this view, it is found that the language of the charter is very different from the one before us. The East Portland charter amendment of 1872 (Laws 1872, p. 181) only excepts the territory out of the jurisdiction of the county court and authorizes the city to collect road taxes for repairs of streets. It also appears that the act of 1872 was an amendment or addition to the East Portland charter relating to county roads, and not mentioned in the original charter. Mr. Justice LORD, in holding that the act did not make it a street, says: "The case is different where, by the act, the limits of the city are extended, and new territory is acquired and subjected to the laws and jurisdiction of the municipality." Also, in the Eugene charter (Laws 1889, pp. 273, 296), Sec. 98 gives authority to the city, when it is deemed expedient, to establish streets upon county roads within its limits; and when so located they shall become streets. In *Huddle-*

ston v. Eugene, 34 Or. 343 (55 Pac. 868: 43 L. R. A. 444), it is held that no new condemnation was required and that the ordinance for its improvement was an acceptance of the grant; and in the opinion in that case, Mr. Justice MOORE cites with approval *McGrew v. Stewart*, 51 Kan. 185 (32 Pac. 896), in which it is held that, where a city extends its boundary over new territory, the highway therein was impressed with the character of a street, and subject to exclusive control by the city and to the liabilities and servitudes of all other streets within the city. To the same effect is *Elliott, Roads & Streets* (1 ed.), p. 313; same work (2 ed.), § 450.

2. Whether a county road becomes a street, when included within the corporate limits of a city, depends upon the intention of the legislature, as gathered from the city charter, general laws and the whole course of legislation on the subject: 2 *Dillon, Munic. Corp.* § 676 *et seq.*; *State ex rel v. Com'rs Putnam County*, 23 Fla. 632 (3 South. 164). Where the legislature has expressly conferred upon the corporation control of the county roads within its boundaries, and excepted the territory within it from county control for road purposes, there is no question but that such highways become streets, and subject to all the burdens of streets. This is definitely stated in 27 *Am. & Eng. Enc. Law* (2 ed.), 104, and recognized in *Elliott, Roads & Streets* (2 ed.), § 116. In *Railroad Co. v. Defiance*, 52 *Ohio St.* 262, 299 (40 N. E. 89, 97), the court say: "While counsel for the plaintiff concede that the parts of the county roads so brought within the defendant's corporate limits became highways of that municipality, they contend it acquired control of them, in the language of the petition, 'for police purposes only,' by which we understand counsel to mean that the defendant was without authority to improve them at all, or, if improved, the expenses should be paid by tax collected from the property of the whole county. This position is, we think, untenable. The highways so brought within the corporate limits of the defendant were removed from the control which the county commissioners theretofore had over them, and became subject to the control, supervision and care of the municipal

authorities, like other streets and highways of the corporation. By express statutory provision the council is given 'the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation,' and is charged with the duty of causing 'the same to be kept open and in repair, and free from nuisance': Section 2640, Rev. St. The duty thus devolved upon the council is attended with the power to do whatever may be necessary in the proper and lawful performance of the duty, including the power to improve such ways, or parts thereof, in any lawful manner, when and as the public convenience may demand. Grading a street, and changing its grade, when necessary for its convenient use by the public, are lawful modes of improving the street, and keeping the same open and in repair." To the same effect are *City of Louisville v. Brewer's Adm'r.* 24 Ky. Law Rep. 1671 (72 S. W. 9); *Almand v. Atlanta Con. St. Ry. Co.* 108 Ga. 417 (34 S. E. 6); *Cascade County v. City of Great Falls*, 18 Mont. 537 (46 Pac. 437); *State v. Jones*, 18 Tex. 874; *Town of Ottawa v. Walker*, 21 Ill. 605 (71 Am. Dec. 121). By the terms of the charter above quoted, county roads within the corporate limits of the City of Newberg, existing at the time of the act of incorporation, thereby became streets.

3. The plats of the Town of Newberg and additions thereto include the ground traversed by the county road now claimed as First Street, which is marked thereon as "First Street"; and although prior thereto there was an easement over the same in the public for a roadway, yet the fee remained in the original owner or his grantee. In most of these plats the dedicators use the language, "We hereby dedicate all our interests in the streets and alleys as shown by said plat, field notes and survey," or equivalent language; and even where such words of dedication are omitted, and the street is shown by the plat, the sale of lots by the proprietor with reference to such plat is sufficient to complete such dedication (*Spencer v. Peterson*, 41 Or. 257: 68 Pac. 519, 1108; *Christian v. Eugene*, 49 Or. 170: 89 Pac. 419); and, such being the case, the dedication subjects the street to any new servitude incident to it as a street. This is

also recognized in the case of *Heiple v. East Portland*, 13 Or. 97 (8 Pac. 912), where Mr. Justice LORD says: "The next defense is estoppel by dedication, in this: that the plaintiff sold lots abutting upon the disputed tracts according to a recorded plat, recognizing the same as a street. As stated, this certainly would be a good defense." But in that case the disputed tract was expressly reserved from the dedication. Some of these additions were laid out and the plats executed prior to the incorporation of the town in 1889; but by the act of incorporation they became subject to the control of the municipality and to the liabilities and servitudes incident to the streets (*McGrew v. Stewart*, 51 Kan. 185: 32 Pac. 896), and upon either ground First Street is a street subject to all the burdens incident to streets within the municipality.

4. The validity of the method adopted by the city in apportioning the expense of the improvement is questioned by plaintiffs. The expense of the curb and graveling was uniform as to every lot, and the only fluctuation in expense is in the grading, which cost \$713.50 for the whole distance of 2,402 feet—less than 15 cents per front foot. If the expense of grading the half street in front of some lots was only one-fourth as much as that of grading in front of others, as testified by one witness, the cost for grading the lots incurring the least expense would be seven and a half cents per front foot, and according to plaintiffs' theory the excess of their burden would not exceed \$3.50 upon a 50-foot lot. Section 82 of the charter of 1893 (*Laws 1893*, pp. 282, 305), is relied upon by plaintiffs as supporting their claim that each lot is liable for the improvement of only the half of the street in front of it or abutting upon it. The only purpose of this section is evidently to declare what proportion of a block shall be liable for the improvement of a street in front of it, viz.: In extending the liability to the middle of the block, and considering the charter as a whole, this section can only be construed to mean that all the portion of the block extending back to the center line thereof shall be liable for the full amount assessable to the half street in front of it.

We arrive at this conclusion for the reason that Section 64 (Laws 1893, pp. 282, 301), provides that the council shall "assess upon each lot or part thereof liable therefor its proportionate share of the cost" of the improvement. Section 65 (Laws 1893, pp. 282, 301) also provides that the total cost of the improvement shall be assessed proportionately to the adjacent lots; and Section 66 (Laws 1893, pp. 282, 301) provides that the council "shall then proceed to ascertain and determine the proportionate share of such cost assessable to each tract of land, and to assess by resolution each lot or parcel of ground with its proportionate share of such cost, which determination and assessment shall be final and conclusive."

Section 110 (Laws 1893, pp. 282, 312) still further strengthens this view, as it provides: "In assessing the cost of any street improvement * * upon the abutting property holders, the council shall assess one-half of such cost upon the property on each side of such street * * to a line in such adjacent or abutting blocks parallel with such street or alley so improved, and one-half the entire distance across such block therefrom: provided, that all assessment for the cost of building or repairing any sidewalk or pavement shall be upon the property immediately adjacent to or abutting thereon, and for the full price of constructing or repairing such sidewalk or pavement." The exception contained in that section clearly shows that the legislature meant that the expense of the whole improvement is to be apportioned to the adjacent property, except sidewalks and pavement, which are to be built by the owner in front of his own property, and the provision that one-half of the improvement shall be assessed to each side of the street shows that the measure is not to each lot the expense of the improvement of the half street abutting such lot. The charter, taken as a whole, clearly contemplates that the expense of the improvement such as this shall be apportioned to the abutting property on each side of the street back to the center line of the block proportionately, and even with that limitation it leaves considerable discretion to the council as to what shall constitute such proportionate apportionment; and we find that there was no error in appor-

tioning the total expense of the improvement *pro rata* according to the frontage on the street.

The decree of the lower court is affirmed. **AFFIRMED.**

Argued 28 July, decided 20 August, 1907.

STATE v. REMINGTON.

91 Pac. 478.

CRIMINAL LAW—MAP AS EVIDENCE.

1. A map of premises under consideration, made by a disinterested competent person, is admissible in evidence, though made by one who did not find sundry articles shown to have been picked up at points marked on the map, where the persons who did find the articles say the map is correct and shows truly the location they refer to in their testimony.

ORDER OF PROOF—RENDERING EVIDENCE COMPETENT BY SUBSEQUENT TESTIMONY.

2. Incompetent evidence that is improperly admitted may be made competent by later testimony, and thereby the original error will be corrected, the order of proof being a matter of discretion.

MAPS DRAWN TO ILLUSTRATE A THEORY AS EVIDENCE.

3. A map on which is correctly delineated the premises referred to is not rendered incompetent because it has lines and marks intended to illustrate or support the theory of the party for whom it was made, the difference between the reality and the theory being properly explained.

EVIDENCE—EXPRESSING OPINION INSTEAD OF FACTS.

4. It is competent for a qualified witness to express an opinion as to the proper deduction to be drawn from the facts shown in evidence where they are of such a nature that they cannot be clearly placed before a jury disconnected from the conclusion of the witness.

A witness, first shown to be competent, may state, on a criminal trial, his opinion as to whether a .30-30 rifle would make a hole the size of the hole in a picket from a fence shown him, notwithstanding it was admitted that the shooting was done with a .30-30 rifle, and though the picket and the bullet which struck the complaining witness, but which was mangled and battered, were received in evidence, such testimony not being subject to the objection that the question was one which the jury was as competent as witness to determine.

ASSAULT WITH INTENT TO KILL—EVIDENCE OF EXTENT OF INJURY.

5. On a trial for assault with intent to kill a physician who attended the injured person may state the nature and extent of his injuries, since such evidence tends to explain the extent and nature of the attack and its purpose.

ASSAULT WITH INTENT TO KILL—INSTRUCTION ON SELF-DEFENSE.

6. On a trial for assault with intent to kill, it appeared that ill feeling had existed between the complaining witness and defendant, and that defendant knew that complaining witness had threatened to take his life and went armed for that purpose; that defendant, having occasion to call on one who lived beyond complaining witness' farm, selected a route which took him across complaining witness' farm, but which route persons living in that vicinity had used without objection, and that defendant carried with him a rifle. Held to warrant a charge that one cannot claim self-defense if he inten-

tionally put himself where he knew he would have to invoke its aid, that if defendant could have avoided any conflict without increasing the danger to himself it was his duty to do so, and that if defendant sought the conflict, and the prosecuting witness showed fight and used a deadly weapon, or did an act in such a way as if about to engage in an affray, he could not invoke the law of self-defense until he had first retreated as far as he could with safety to himself.

From Marion: GEORGE H. BURNETT, Judge.

E. L. Remington appeals from a conviction of a charge of assault with intent to kill.

AFFIRMED.

For appellant there was a brief over the names of *Grant Corby*, *William Henry Holmes* and *Rauch & Senn*, with an oral argument by *Mr. Corby* and *Mr. Holmes*.

For the State there was a brief over the names of *A. M. Crawford*, Attorney General, *John H. McNary*, District Attorney, and *C. L. McNary*, with an oral argument by the District Attorney.

Opinion by MR. JUSTICE MOORE.

The defendant, E. L. Remington, was convicted of the crime of assault with intent to kill, alleged to have been committed in Marion County, November 22, 1906, by shooting and wounding one W. W. Slaughter, and appeals from the judgment which followed.

1. His counsel contend that an error was committed in admitting in evidence, over their objection and exception, a map of the *locus in quo* where the shooting occurred. B. B. Herrick, county surveyor of the county mentioned, testified that, pursuant to the district attorney's direction, he measured a part of Slaughter's land and made a plat thereof, which he identified, and upon which appear black lines indicating certain objects. Thus, in a small square on the map is written the phrase "Pig shed," and on the west side of the shed are two parallel lines, marked "Log 3 feet high." At the southwest corner of the shed is a small circle having a cross therein, and designated by the words "Point where shells were found." A garden is represented as being east of the pig shed, in which is another circle similarly marked, and indicated by the sentence "Point where plow lies." Two lines extend north and south, 29 and

124 feet, respectively, east of the pig shed, which are specified, in the order named, "Board fence 4 feet high" and "Picket fence 5 feet high." At a point in the palings last mentioned, in a direct line between the circles specified, is a cross, marked "Bullet hole in fence 3½ feet above ground." A trail is represented as extending southeasterly across Slaughter's land, the nearest line of which is about 122 feet south of the pig shed. A county road, extending north and south, is indicated on the map as being east of such premises, and across the highway are certain lines, marked "Pomeroy's house." All the objects thus specified, and others not mentioned, are represented by black lines. There are also on the plat certain red lines, in the broken parts of which appear numbers, indicating in feet the distance, respectively, from one object to another. Omitting these numbers, the red marks are as follows: One direct and two curved lines connect the circles hereinbefore mentioned. A line extends from the circle designating the point where the plow lies to Slaughter's dwelling, and from thence to Pomeroy's house. A line is drawn southeasterly from the pig shed to the trail, and another line also extends southwesterly from the point where the plow lies to a point in the picket fence. The objections interposed to the introduction of the map in evidence were based on the ground that no testimony had been introduced tending to show that the shooting had been done at any given point, and also for the reason that the red lines were made on the plat, at the district attorney's direction, to illustrate his theory of the case.

The state attempted to establish the fact, by the discovery of the three empty shells of the same caliber as the defendant's rifle, which parts of cartridges were found near the southwest corner of the pig shed, that Remington fired his gun from ambush behind the log indicated on the plat. The county surveyor was not present when the metallic cases were discovered, and the information which enabled him to note on the plat the words "Point where shells were found" was not derived from his personal observation of a material fact, but obtained from the declarations of others. In *Adams v. State*, 28 Fla. 511 (10 South.

106), the plaintiff in error was charged with the crime of murder in the first degree, and at his trial a map was offered in evidence, on which were delineated the route of a certain person and also the positions severally occupied by others. A verdict of guilty as alleged having been returned, judgment was rendered thereon, in reversing which the court say: "Ike Spanish did not take the map and trace the route in explanation of his testimony; neither did Sandy Sheffield mark on the map where he was, and where he saw Will Adams passing along; but it appears that Mr. Brown put these indications on the map. It also seems that the map was introduced in evidence after Spanish and Sheffield had testified. We think a map or diagram of the country in its physical condition at the time can be put in evidence, and any witness, in giving testimony as to localities, can indicate on the map the relative position of things or persons. But for a person who knew nothing of these matters, except what he heard from others, to designate the movements of persons on the map, would be testimony of a secondary character, and improper to be admitted." In the case at bar A. E. Pender testified that the morning after the shooting he found in the grass and ferns at a point about six or eight inches west of the log indicated on the map, and at the southwest corner of the shed, two "30-30" shells, and two days thereafter he discovered another shell of the same size about three feet southwest of where he found the others; and, his attention having been called to the map, he identified thereon the places and objects thus indicated. Referring to a bullet hole in a picket of the fence he further stated that the perforation in the paling was in a direct line between the places where the two shells were found and where the plow was left in the furrow. This witness stated on cross-examination that, from the place where he found the two shells, a person using a gun right-handed would have been behind the shed.

2. The order of proof is regulated by the sound discretion of the court (B. & C. Comp. § 842); and, though the map was received in evidence before Pender was called as a witness, his identification of the "point where the shells were found" ren-

dered the plat competent evidence, as illustrating his description of the premises: 4 Elliott, Evidence, § 3044; *Rowland v. McCown*, 20 Or. 538 (26 Pac. 853); *People v. Cassidy*, 133 N. Y. 612 (30 N. E. 1003).

Considering the respective theories of the district attorney and defendant's counsel, it is deemed proper to state the relation which existed between the prosecuting witness and Remington at the time the shooting occurred. Slaughter's wife had been divorced from him on the ground of cruel and inhuman treatment, in which suit he made no appearance. He blamed Remington, however, for his marital troubles, and had repeatedly threatened to take his life, to accomplish which he usually carried a revolver, occasionally exhibiting it, and declaring that he went thus armed to execute his purpose, which menaces had been communicated to Remington. Slaughter possessed the reputation, in the vicinity in which he lived, of being quarrelsome and desperate. The defendant's testimony is to the effect that he was engaged at Woodburn in selling firearms and other goods; that he left his place of business, November 22, 1906, in the afternoon, intending to call upon one George Killin, who lived in an easterly direction and beyond Slaughter's farm; that, thinking he might find some game on the way, he took with him, as was his custom, a gun, and, as he was passing on the shortest route along a trail generally used by the public across Slaughter's land, he observed some one moving, and, looking carefully, he recognized Slaughter approaching him in a threatening manner, armed with a shotgun; that the witness first accidentally discharged his gun upwards, but thereafter hastily firing two other shots, Slaughter was hit; that the deponent immediately started back to Woodburn to surrender himself to a peace officer; that as he approached the town he saw several women, and thinking they had heard of the difficulty he had encountered, and possibly might be alarmed to see him armed, he hid his gun under a fence. On cross-examination, he was asked where he was at the time of the shooting, and replied. "I don't know exactly where I was." He further said, however, that he did not think he was on the trail

indicated on the map, but that there were several other regularly traveled paths leading across Slaughter's land, on one of which he was traveling.

William Esch, a deputy sheriff, stated on oath that Remington, having given bail, was temporarily released and went with the witness to the outskirts of Woodburn, where they found under a fence a "30-30" Savage rifle, which the defendant admitted he had hidden at that place. This gun and the shells discovered by Pender were received in evidence. Slaughter testified that as he was plowing in his garden he heard the report of a gun behind him, and, looking back, a shot soon thereafter penetrated his left shoulder, whereupon he ran toward his house, when another shot was fired, and some missile pierced his left eye, destroying the sight thereof; that when he entered the house he seized a loaded double-barreled shotgun with which to defend himself, and started for Pomeroy's house; and that he did not see the person who did the shooting. Pender, whose testimony has hereinbefore been adverted to, further stated on oath that he heard shots fired November 22, 1906, in the afternoon, and saw Slaughter, as he reached the county road, carrying a shotgun and calling for help; that the witness took the gun and found it loaded with paper cartridges, the cap on one of which had apparently been struck or indented by the firing pin. James Monto, who is Slaughter's nephew, testified on rebuttal that he visited this uncle October 6, 1906, and attempted to use the latter's shotgun, but did not discharge it, and looking at the shells he found the cap had snapped.

3. The foregoing is thought to be a fair synopsis of the material testimony, relating to the cause of the shooting, and, based thereon, the question to be determined is whether or not the court erred in permitting the district attorney, over objection and exception, to illustrate his theory of the case by introducing in evidence a map of the *locus in quo*, having thereon red ink lines extending from the point representing the southwest corner of the pig shed to the point indicating the place where the plow was lying when the plat was made. In *People v. Phelan*, 123 Cal. 551 (56 Pac. 424), the defendant was con-

victed of the crime of murder in the first degree on circumstantial evidence, in part tending to support the theory of the prosecution that, lying in wait behind a stump, he watched the approach of his victim, whom he killed, and thereafter claimed that he acted in self-defense. In affirming the judgment in that case, Mr. Chief Justice BEATTY, referring to a plat of the *locus in quo* which was admitted in evidence, makes the following observation: "It is contended that the superior court erred in overruling objections of defendant to the admission in evidence of maps and photographs of the scene of the homicide, especially of the evidence given in that connection as to the position of the hollow stump, as to the relative elevations of the stump and junction of the trail, as to the fact that there was an unobstructed view from the one point to the other, etc. The court did not err in admitting this evidence, the manifest purpose of which was to sustain the theory of lying in wait. The facts surrounding the killing were certainly material, and the topography of the spot where the killing occurred was clearly relevant. It was not for the court, but for the jury, to determine what theories could be justly founded on such facts."

In the case at bar the discovery of the shells, of the same caliber as that of the defendant's rifle, and the penetration by a bullet of a picket in a direct line between the points where the shells were found at the southwest corner of the pig shed and where the plow was left in the furrow in the garden, as claimed by Slaughter, when he was shot, are circumstances tending to establish the theory of the prosecution, in illustrating which the map, with the red lines thereon, was admissible in evidence, not to prove a substantive fact, but to illustrate the testimony applicable to the physical conditions. The map was made by a competent and evidently disinterested person after a careful survey of the premises, and, though the plat contained certain written words, descriptive of existing objects, no objection was urged by defendant's counsel against the admission of the map in evidence on account of such memoranda. In *People v. Johnson*, 140 N. Y. 350, 354 (35 N. E. 604, 606), the court,

in commenting upon the admission of such evidence, remark: "There was no error in permitting the drawings representing the premises to be put in evidence. They were not photographs, but sketches made by an artist showing the locality of the blood stains in the basement and on the doors above. He swore to their accuracy from his own personal knowledge and observation. The learned trial judge was extremely careful about them. He required explicit proof of their accuracy, and, when descriptive words were marked upon them, stood ready to strike off any to which reasonable objection should be made. They served only to explain localities, and their accuracy was satisfactorily shown."

4. Dr. Neil O'Leary, a practicing physician, testified that he visited Slaughter professionally soon after he was shot, and found a large penetrating wound in the left shoulder; that between the patient's third and fourth vertebra he observed a protuberance, in which he made an incision and removed a ball that had become "mushroomed," which bullet was identified by him and received in evidence. The witness further stated on oath that, immediately after treating the wound, he visited Slaughter's premises and found, in the vicinity where the shooting occurred, a picket that had been pierced by a bullet; that the entrance of the bullet had made a small hole, but its exit had produced a larger perforation; that he removed the paling, which, having been produced at the trial, he identified, whereupon he was asked,

"Did you ever handle firearms?" and he answered:

"Yes, sir.

Q. Have you ever owned a 30-30 rifle?

A. No, sir; I have never owned one. I have handled one.

Q. Do you know how large a cartridge it has?

A. Yes, sir.

Q. Do you know how large the slug is?

A. Yes, sir.

Q. Do you know how large a hole the slug would make?

A. I do.

Q. State whether or not, in your opinion, a 30-30 rifle would make a hole the size of this one in this picket."

The defendant's counsel objected to the question, on the ground that, as the bullet had been received in evidence, the orifice in the paling afforded the better proof of the fact sought to be elicited. The objection was overruled, and an exception allowed, whereupon the witness replied, "That is about the size hole it would make." It is argued by defendant's counsel that, although their client, as a witness in his own behalf, testified that he did the shooting with a 30-30 rifle, as the bullet and the picket referred to by the witness had been received in evidence, the jurors were as competent as O'Leary to determine whether or not the hole in the paling had been made by a bullet of the caliber specified, and, this being so, an error was committed in permitting the witness to answer the question. It will be remembered that the objection interposed at the trial is based on the requirement which the law imposes upon a party to furnish primary or best evidence, while the contention of defendant's counsel in this court seems to rest on the assumption that the question propounded involved an inquiry concerning a matter which was within the observation of persons in the ordinary walks of life, and therefore it did not require an answer from an expert witness. It could probably be said that the legal principle now insisted upon was not considered by the trial court, and for that reason its action in determining the matter was not subject to review. Treating the question, however, as properly reserved, we think average persons, who, it must be assumed, composed the panel of the jury, could not say with any degree of certainty what a "30-30" rifle was, or determine what would be the size of a hole which a bullet discharged from a gun of that caliber would make in a paling. Believing that correct answers to these inquiries could not be given by all men of common education and experience, and that the jury were incapable of forming a correct conclusion on the subject from a comparison of the enlarged "mushroomed" bullet with the hole in the picket, the testimony so objected to was admissible: *First Nat. Bank v. Fire Association*, 33 Or. 172 (53 Pac. 8); *Farmers' Bank v. Woodell*,

38 Or. 294 (61 Pac. 837); *Aldrich v. Columbia Railway Co.*
39 Or. 263 (64 Pac. 455); *Ruckman v. Imbler Lumber Co.*
42 Or. 231 (70 Pac. 811).

5. Dr. J. P. Goray testified that he was a practicing physician, and made a specialty of diseases of the eye, ear, nose and throat, and that on December 9, 1906, he had treated Slaughter; and he was thereupon asked: "Did you examine his wounds at that time?" An objection to the inquiry on the ground that it was incompetent, immaterial and irrelevant, having been overruled, he replied: "I examined his eye, and saw his back dressed." After detailing the then condition of the patient, the witness further testified that on January 4, 1907, he removed Slaughter's injured eye to preserve the sight of his remaining organ of vision. It is contended by defendant's counsel that the testimony so objected to did not relate to any of the issues involved in the trial, but tended to arouse sympathy for Slaughter in the minds of the jurors, and to divert their attention from the merits of the case, to the prejudice of their client; and hence an error was committed as alleged. In the commission of the crime charged in the information herein, the intent with which the shooting was done is necessarily a controlling element. It is not the intention to use a deadly weapon, but the determination to kill, of which the use of the weapon is evidence, that constitutes an assault with intent to kill: *Palmore v. State*, 29 Ark. 248. Testimony, therefore, tending to show the magnitude of an assault, from which a felonious intent is deducible, may be admitted for that purpose: *People v. Sutherland*, 104 Mich. 468 (62 N. W. 566). It is competent, as a part of the *res gestae*, for a person who has been beaten by another to detail the extent and effect of the injury inflicted: *People v. Zounek*, 66 Hun, 626 (20 N. Y. Supp. 755). So, too, a physician who has treated a person wounded by the felonious use of a dangerous weapon may testify as to the nature of such injury: *State v. Haynie*, 118 N. C. 1265 (24 S. E. 536). We believe the testimony of Dr. Goray was admissible, in the consideration of which the jury

might determine whether or not the defendant, in using the weapon, intended to take Slaughter's life.

6. The court charged the jury in part as follows:

"I further instruct you, in relation to the law of self-defense, that one cannot claim its benefits if he has intentionally put himself where he knows or believes he will have to invoke its aid. The circumstances justifying an assault under the law of self-defense must be such as to render it unavoidable. If you believe from the evidence beyond a reasonable doubt that the defendant could have avoided any conflict between himself and Slaughter, without increasing the danger to himself, it was his duty to avoid such conflict, and so render a resort to the law of self-defense unnecessary. If the defendant sought the conflict with Slaughter, and Slaughter showed fight, and used the deadly weapon or did an act in such a way as if he was about to engage in an affray, if under those circumstances the defendant sought the conflict, he could not invoke the law of self-defense until he had himself first retreated so far as he could with safety to himself."

An exception having been taken by defendant's counsel to this part of the charge, it is insisted that an error was committed in giving it. The instruction thus challenged is similar in import to a part of a charge given in the case of *State v. McCann*, 43 Or. 155, 161 (72 Pac. 137, 139), in speaking of which it is there said: "The language employed by the court in the instruction complained of must be read in the light of the surrounding facts. It is possible that, under some circumstances, the charge might be subject to objection; for in a free country it is not expected that one person shall flee from another, and it may be that the demands of business might require one intentionally to go where he knows or has reason to believe he may be in imminent danger, and possibly compelled to resort to force as a matter of self-defense."

In order thoroughly to understand the meaning of the instruction hereinbefore quoted, other parts of the charge relating to the same subject, which immediately precede the language complained of, will be set out, to wit:

"Although Slaughter may have been a violent man, or a dangerous man, and although he may have made threats against

the life of the defendant, yet he does not forfeit his right to personal safety unless he does some overt act indicating a present purpose to do injury or great bodily harm, or to kill the defendant. Mere threats alone, without some overt act indicating an intent to carry the threats into execution, would not authorize the killing or doing great bodily harm by the defendant, and would not justify the defendant in shooting Slaughter as a means of self-defense. The right of self-defense being founded upon necessity, the party who would invoke it must avoid the attack, if he can do so without danger or peril to himself. Hence it is that no threat to kill or inflict great bodily injury, without an overt act indicating a design to carry the purpose into immediate effect, will justify the taking of human life; and it is the duty of one that is threatened so to act that he will not precipitate the attack, and thus himself bring on the necessity for taking life which he could safely avoid.

On the other hand, if the defendant was where he had a right to be, and was assaulted by Slaughter with a deadly weapon, and without provocation, and with the apparent purpose of killing the defendant or doing him great bodily harm, or if the acts of Slaughter were such as to lead a reasonably prudent man in the defendant's situation to believe, and the defendant did honestly believe, that he was in imminent danger of death or great bodily harm, the defendant would not be obliged to retreat, but could stand his ground and meet the attack in such a way and with such force as, under all the circumstances, he at the moment honestly believed, and had a reasonable ground to believe, was necessary to save his own life, or protect himself from great bodily harm.

Again, the defendant would have no right to seek a quarrel with Slaughter, although Slaughter had made threats and was a dangerous man."

Immediately following the instruction first above repeated, the court further said to the jury:

"It is for you to determine now whether, on the one hand, the defendant was where he had a right to be, and was attacked by Slaughter or assaulted by him, or whether the acts of Slaughter were such as to raise in the defendant's mind, as a reasonably prudent man in his situation, a reasonable belief that there was in store for him either death or great bodily harm, and that that danger was imminent; but you are to consider, on the other hand, whether he sought a conflict with Slaughter, and apply to it the rules which I have given you."

Considering this part of the charge in connection with the instruction excepted to, the defendant, prior to the shooting, knew that Slaughter had threatened to take his life, and by reason of such manifest hatred Remington must have known that the privilege of passing over the trail that crossed his enemy's land would be denied him, though persons living in that vicinity had used the way without objection. Necessarily possessing this information, the defendant voluntarily selected a route which, when traveled, took him, armed with a dangerous weapon, upon the premises of his adversary, who, he must have had reason to believe, would dispute his further progress in that direction. Slaughter had been living at Woodburn, and it is claimed that his return to the farm was not known by Remington, when the latter undertook to pass over the trail. His want of knowledge in this particular was a question which the jury were called upon to determine, and they undoubtedly considered the matter. In view of all the attendant facts and circumstances, we believe the court was warranted in giving the instruction complained of.

Other alleged errors are assigned; but, deeming them unimportant, the judgment is affirmed.

AFFIRMED.

Argued 18 July, decided 20 August, rehearing denied 17 Dec. 1907.

SCOTT v. WHITE.

91 Pac. 487.

FRAUD—DEGREE OF PROOF REQUIRED.

1. Fraud must be clearly and satisfactorily proven to support a decree.

RESULTING TRUST—EFFECT OF EVIDENCE.

2. In a suit to enforce an alleged resulting trust in certain land, evidence held insufficient to sustain a finding that plaintiff and defendant W. purchased the land jointly, under an agreement that the actual cost of the land was \$7,000 and that plaintiff should be entitled to a certain portion of the entire tract on that basis, but to require a finding that defendants, acting as real estate brokers, sold so much of the land as plaintiff desired in a single tract on a basis of \$7,000 for the entire tract, and themselves took the balance of the tract in detached portions under their option to purchase the entire tract for \$5,000.

JOINT ADVENTURES—ACCOUNTING.

3. Plaintiff and defendant, W., who was a member of a firm of real estate brokers having an option to purchase a tract of land for \$5,000, contracted to buy the land on a basis of \$7,000, under an agreement providing that if plaintiff

and defendant W., within 60 days after the payment of the earnest money, paid the balance of \$6,860, the owner's agent agreed to convey the land, etc. *Held*, that such agreement bound W. and plaintiff to pay the owner \$7,000 for the land, and hence the fact that W. thereafter avoided fulfilling his part of the obligation by exercising an option held by his firm did not create a liability on W.'s part to account to plaintiff for the amount saved.

From Jackson: HIERO K. HANNA, Judge.

Statement by MR. COMMISSIONER SLATER.

This is a suit by William Scott against John F. White and Benjamin Trowbridge to impress upon certain lands held by defendants a resulting trust, arising out of an alleged joint purchase by plaintiff and defendants of a larger tract, of which the land in question was a part. It is alleged, in substance, that about March 15, 1903, defendants proposed to plaintiff that they jointly purchase of A. L. Dickinson 2,105.82 acres of land in Jackson County and that defendants entered into such an agreement with plaintiff; that defendants concluded the negotiations for the purchase of the land, and falsely and fraudulently represented to plaintiff that the purchase price thereof was \$7,000, whereas they paid but \$5,000, of which amount plaintiff furnished \$4,542 and defendants \$458; that, after the purchase was made, plaintiff and defendants partitioned the land between themselves, the former receiving 1,365.82 and the latter 740 acres; that plaintiff, relying upon the representations of defendants that the purchase price of the premises was \$7,000, conveyed to defendants 740 acres of land as their share, and defendant White conveyed to plaintiff 1,365.82 acres as his share, defendants representing to plaintiff that such division was in proportion to the respective amounts which each had contributed to the purchase thereof; but it is alleged that defendants contributed only \$458. The prayer is that defendants account to plaintiff for 547 of the 740 acres conveyed by him to White; that plaintiff be decreed the owner in fee of that amount of the land, and that defendant White be decreed plaintiff's trustee thereof; and that plaintiff have judgment against defendants for his share of the proceeds of any of the land sold by them since the making of the partition.

The defendants by general denial traversed the complaint,

except as thereafter alleged. The further averments are, in substance, that defendants were and are partners engaged in a real estate business at Medford, Jackson County; that at and for a long time prior to March 15, 1903, they had an option for the purchase of the property described in the complaint at the price of \$5,000; that on that date it was agreed between the plaintiff and defendants that plaintiff should purchase, under defendants' option, as much of all of the property as he might thereafter desire and be able to pay for, upon a basis per acreage of \$7,000 for the entire tract; that defendants would purchase the rest of the property at their own price, and pay all commissions and expenses necessary for the carrying out of the deal; that prior to the agreement plaintiff had examined the property, and at the time was willing to purchase as much of the tract as he might be able to pay for upon a basis of \$7,000 for the entire tract, and that defendants agreed that they would cause to be conveyed to plaintiff by the owner as much of the land, at the rate herein specified, as he would pay for, and that the defendants would take the balance under the terms of their option; that, in accordance with the terms of the contract, defendant caused the owner to convey all of the land to plaintiff and defendant White; that White assisted plaintiff to procure the amount of money necessary to pay for his portion of the land; and that, after the conveyance of the property to them jointly, they partitioned it in the proportion stated in the complaint. By his reply plaintiff denies each affirmative allegation in the answer, "except such thereof as are not in controversion of plaintiff's complaint herein, and except the allegation thereof that defendant White assisted plaintiff in obtaining money," etc. The cause having been tried before the court, findings were made in favor of plaintiff, on which a decree was entered, decreeing plaintiff to be the owner in fee of 547 of the 740 acres deeded by him to defendant White, and that the latter hold the same in trust for plaintiff. Judgment was also awarded plaintiff against the defendants for \$1,182.72 as his share of the proceeds from the sale of 200

acres of the disputed land made by White before the commencement of this suit. From this decree and judgment, defendants appeal.

REVERSED.

For appellants there was a brief over the name of *Reames & Reames*, with an oral argument by *Mr. Allen Evan Reames*.

For respondent there was a brief over the name of *W. Estill Phipps*, with an oral argument by *Mr. Robert L. Mattingly*.

Opinion by MR. COMMISSIONER SLATER.

1. It does not appear by any express averment of the complaint what were the terms of the agreement, if any, between plaintiff and defendants, under which plaintiff claims they jointly bought the property. Whether they were to contribute equally towards the purchase price, and share in the same proportion the advantages of the purchase, or whether one should contribute more than the other, and a different division of the fruits of the transaction be made, is not alleged; but there is the bare allegation that they agreed to jointly purchase a tract of land. But from his subsequent averments it seems to have been assumed by the pleader that the plaintiff was to have an equal advantage with defendants, and that there was to be a division in proportion to the amounts contributed by each toward the purchase price of the land. Hence it is alleged, in effect, that defendants, in making the partition, broke their agreement and by fraud and deceit have obtained an unfair advantage over plaintiff and deprived him of his proportionate share of the land. Assuming that such was the issue framed by the pleadings, we are of the opinion that the plaintiff has not sustained that issue by that preponderance of clear and satisfactory proof that a court of equity always requires to establish fraud upon another. Plaintiff not only has the burden of proof of the issue, but the charge must be proved by clear and satisfactory evidence. In such a case the degree of proof required is, perhaps, enhanced by the reason of the latitude allowed in admitting evidence to prove fraud: *Freeman v. Topkis*. 1 Marv. (Del.) 174 (40 Atl. 948). "A party, therefore,

relying upon the establishment of a cause of action or a right to a remedy against another, based upon the alleged commission of a fraud by such person, must show affirmatively facts and circumstances necessarily tending to establish a probability of guilt in order to maintain his claim. When evidence is capable of an interpretation which makes it equally as consistent with the innocence of the accused party as with that of his guilt, the meaning must be ascribed to it which accords with his innocence rather than that which imputes to him a criminal intent": *Morris v. Talcott*, 96 N. Y. 100.

2. Plaintiff has endeavored to bring himself within the case of *Kroll v. Coach*, 45 Or. 459 (78 Pac. 397: 80 Pac. 900), where it was held that a person having exclusive information relative to a proposed purchase, offering others an opportunity to take an interest and share the anticipated advantages on equal terms with him, is bound to act with entire truthfulness and good faith toward them in the matter, and if he derives a personal gain by deceiving them he is accountable as a trustee *ex maleficio*, on the legal theory that such person thereby assumes a relation of trust and confidence towards the intending purchasers. Opposed to this theory is the contention that the parties were dealing with each other at arm's length and as strangers to any fiduciary relation. In that case neither of the parties were in the business of real estate agents, but they were seeking to jointly buy from another for their own advantage. The facts of this case are that early in the year 1903 plaintiff came to the Town of Medford, seeking a new home, and wishing to invest in timber lands. He there became acquainted with defendants, who were partners in a real estate business, and to whom he disclosed his intentions. They had shown him different pieces of property which they had for sale as agents for others; but, none of these suiting plaintiff, they suggested to him the Donegan tract, which they had for sale, comprising 2.105.82 acres, and consisting of four separate tracts situate in the same vicinity. This land belonged to one Dickinson, a nonresident of Oregon, who had come into the ownership of it

by foreclosure of a mortgage, and thereafter had employed Geo. W. Hazen, of Portland, as his agent to sell the land, as well as A. E. Reames, an attorney of Medford, who had foreclosed the mortgage, and, since bidding it in for plaintiff, had had immediate charge of the land, had been renting it, collecting rents, paying taxes thereon, and endeavoring to find a purchaser in conjunction with Hazen. In February, 1903, they had offered the place through defendants as agents for \$6,000; but, failing to get a sale at that price, Reames gave to defendants the privilege of buying or selling the tract as an entirety at the price of \$5,000. Plaintiff testifies that at the inception of his dealing with defendants they told him they could sell him this tract at \$4 per acre and make a good commission, that defendant White took him to view the land with the object of making a sale, and that after having looked it over White asked him what he thought of it, to which he replied: "It looks cheap at \$4 per acre, and if I had the money I believe I would buy it." And then White said: "That is our fix. If we had the money, we would buy it ourselves." Up to this point plaintiff confesses that he was dealing with defendants at arm's length, that he knew they were real estate agents, and were acting as agents for others, and that they were expecting a profit or commission out of this land by procuring a purchaser for the whole of it; and hence at that time no relationship of trust or confidence could have existed between them. But at this point plaintiff claims that defendants voluntarily abandoned the position they occupied of dealing with him at arm's length, and, surrendering all claims for commission or profits, they took him into their confidence. It is manifest that to establish such a case the evidence should be clear and convincing.

Plaintiff further testified that White then proposed to him: "What is the matter with our buying it together?" To which plaintiff replied: "My money is pretty well tied up back East. I don't know as I can." That White then said: "If you want to go in with us, we will let you in on the ground floor. We

won't charge you any commission." That plaintiff then asked, "What will be the purchase price, then?" to which White replied, "\$7,000 for the entire tract," and to which plaintiff said, "If I can have 60 days to get my money, I will go in with you." Plaintiff further testified that White procured 60 days' time by paying to C. L. Reames, brother of A. E. Reames, as a forfeit, the sum of \$150, of which plaintiff furnished one-half and defendants one-half; that White obtained from C. L. Reames, as Dickinson's agent, a receipt in the following form:

"\$150.00.

Jacksonville, Oregon, Mar. 19, 1903.

Received from John F. White and William Scott the sum of one hundred and fifty dollars, which sum of money is accepted under the following conditions: If the said White and Scott shall, within a period of sixty days from this date, time being the essence thereof, pay or cause to be paid to me the full sum of \$6,850, I agree to make, execute, and deliver to them a good and sufficient deed for the 2,105-acre tracts of land in Jackson County, Oregon, known as the 'Donegan Tracts,' and now owned by me. I agree that in case I am unable, within 60 days or at the time the said \$6,850 is tendered to me, to have the title clear and free from incumbrances, that I will refund the said sum of \$150 to the said White and Scott; but in case default should be made in the tendering of the sum of \$6,850 within the said 60 days from this date, time being the essence thereof, then the said \$150 shall belong to me and be my property, and shall be considered as liquidated damages to me. It is understood by the said White and Scott that the premises are under lease to S. F. Godfrey."

It is claimed that plaintiff then, through White's assistance, made arrangements to borrow from a local bank the amount of money he might need. Before the expiration of the 60 days plaintiff and defendants agreed to divide the land between them, the former to take 1,365.82 acres in one body, and the latter to take 740 acres, which was in three separate and detached parcels. When the time came to pay for the land, plaintiff handed White his check for \$4,467, which, together with the \$75 initial payment, made \$4,542 for his share of the land, at the rate of \$7,000 for the entire tract; but defendants in fact paid to Hazen at Portland no more than \$5,000 for the entire

tract. In preparation for the final conclusion of the sale C. L. Reames, through Hazen, had obtained from Dickinson a deed, which he executed on May 13, 1903, conveying the entire tract to N. E. Ross, a stenographer in Hazen's office, for the express consideration of \$5,000, which deed was placed in escrow and, on that amount being deposited for Dickinson, N. E. Ross conveyed the land to defendant White and plaintiff, for the express consideration of \$7,000, when in fact nothing was paid to N. E. Ross. After receiving the title White and Scott exchanged deeds, dividing the property between them as had been previously agreed upon; but the latter contends that the division was made by him, under the belief on his part, induced by statements of defendants upon which he says he relied, that they were paying \$7,000 for the entire tract. Opposed to this is the contention of defendants that they neither agreed with plaintiff "to take him in on the ground floor and charge him no commission," as testified to by plaintiff, nor represented to him that they were to pay \$7,000 for the land, but that, they having an option to buy the land for \$5,000 in the entire tract and learning from plaintiff that he would not be able to buy and pay for all of it at the price first named by them, they proposed to him to let him have as much of the land as he might wish and could pay for at the rate of \$7,000 for the entire tract, and that they would take and pay for the remainder at their own terms, under their option; that plaintiff at first did not know how much of the land he might be able to pay for, and hence the amount that he did finally take was not ascertained by them at the time the agreement was made, but was ascertained later; that when the division was made plaintiff, having his choice, took what he wanted and all he wanted, leaving to them the most undesirable part of the land in three separate and detached pieces. Defendants admit that they concealed from plaintiff the fact that they paid no more than \$5,000 for the entire tract, for they say they were not bound to make any disclosure to him on that matter, because they were not acting as his agents, but were in fact selling to him under their option.

It thus appears that the testimony of the parties to the suit is directly in conflict. Plaintiff relies for corroboration upon a series of letters which passed between Hazen and C. L. Reames relative to this transaction, which discloses no more than an attempt on their part to conceal the actual amount to be paid by defendants for the land; but it is not shown that what they did or said was done at the instance or request of defendants, and hence their statements are not binding upon defendants. They are not parties to this cause, nor privy to the contract with plaintiff on which this suit is based, and therefore their statements cannot be considered. The primary issue to be determined here is: What was the contract between plaintiff and defendants, on which their subsequent transactions were based? Did defendants agree to take plaintiff in "on the ground floor," as he says, and give him an equal chance or share in the profits of the purchase from Dickinson? Or did they sell him as much of the land as he could pay for at the rate of \$7,000 for the entire tract? When this issue is settled, the entire case is determined. We find the plaintiff's testimony, with slight, if any, corroboration, standing in support of his contention, as opposed to the testimony of both defendants; and while both Trowbridge and White on the witness stand, deny plaintiff's statements as to the terms of the contract, and also affirmatively state their understanding of the same, the latter fails to deny the defendants' statements, although he was called as a witness in rebuttal. Trowbridge testified that he first made the arrangements with plaintiff for the sale to him of as much of the land as he might thereafter ascertain he could pay for at the rate of \$7,000 for the entire tract, and that White concluded the transaction. White confirms this testimony; but plaintiff, while he details his conversation with White, fails to deny Trowbridge's testimony as to the contract made with him. It also appears to our satisfaction from the evidence that in making the division of the land the parties did not act in conformity with plaintiff's theory of the contract by sharing equally in the advantages of the purchase, but rather in conformity

with defendants' theory. Plaintiff had his choice of selection, taking the larger and better part of the land, which lies in one compact body and bordering upon the river, distinct advantages for the surrender of which defendants would receive no equivalent if plaintiff's theory was to prevail, while there was left to defendants as their portion three detached tracts of upland of inferior quality, none of which bordered on the river. We must therefore conclude, under the law as hereinbefore announced, that he has failed to make out a preponderance of the testimony in his favor by clear and satisfactory proof. Moreover, it would appear that defendants were either acting as agents for Dickinson or as purchasers from him, and in either event, from the terms of the receipt taken by White from Dickinson's agent, they in fact made themselves liable to him for \$7,000 for the entire tract; and if they in some manner have avoided the fulfillment of that liability it would not create any cause of complaint in favor of plaintiff against the defendants.

The decree should be reversed, and one entered here dismissing the complaint.

REVERSED.

Argued 24 July, decided 27 August, 1907.

DUTRO v. LADD.

91 Pac. 459.

PLEADING—RIGHT TO CLAIM INCONSISTENT DEFENSES.

1. Under Section 73, B. & O. Comp. providing that an answer may contain any new matter constituting a defense, and section 74, that defendant may plead as many defenses as he has, defendants sued on an account for legal services, having pleaded a general denial, were entitled also to plead limitations as an affirmative defense.

STATUTORY CONSTRUCTION.

2. Where several statutory provisions are included in the same act and adopted together, they should be construed together, and, if possible, all be made effective.

SAME—UNAMBIGUOUS TERMS.

3. When the language of a statute is clear and unambiguous the courts should declare the meaning imported and not resort to rules of construction for some other meaning.

LIMITATION OF ACTIONS—FILING COMPLAINT—SERVICE.

4. Under Sections 6, 51, 14 and 15, B. & O. Comp. an action on a contract is barred where the complaint was filed and the summons delivered to the sheriff for service before the expiration of the statutory period, but no service was had or publication begun until more than sixty days thereafter.

From Multnomah: JOHN B. CLELAND, Judge.

Statement by MR. COMMISSIONER KING.

This is an action by Thomas C. Dutro against William M. Ladd and others, as executors of the estate of W. S. Ladd, deceased, and another, to recover \$5,000 attorney fees alleged to be due plaintiff from defendants for legal services furnished between December 15, 1896, and May 9, 1898. The complaint was filed May 7, 1904, at which time a copy of the summons was placed in the hands of the sheriff, but not served until March 9, 1905, when personal service was had and the summons filed. Defendants answered, denying the allegations of the complaint, and as an affirmative defense pleaded the statute of limitations. A reply being filed placing the cause at issue on June 28, 1905, a trial was had before a jury, resulting in a nonsuit. From a judgment thereon plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by Cicero Milton Idleman.

For respondent there was a brief over the name of Williams. Wood & Linthicum, with an oral argument by Mr. Stewart Brian Linthicum.

Opinion by MR. COMMISSIONER KING.

1. It is urged by counsel for plaintiff that defendant, by appearing and answering to the merits and denying the allegations of the complaint is not entitled to maintain his affirmative defense. It is settled that, where it does not appear from an inspection of the complaint that the remedy is barred, the same may be averred in the answer: *Hawkins v. Donnerberg*, 40 Or. 97 (66 Pac. 691, 908). Section 73, B. & C. Comp., provides that the answer may contain any new matter constituting a defense; and Section 74, that the defendant may set forth by answer as many defenses as he may have. While this cannot be done where it appears that the defense is clearly inconsistent, there is nothing inconsistent in the defendant asserting he owes the plaintiff nothing and at the same time averring

that the claim sued on is barred by the statute. The object of the law on the subject is to prevent the assertion of stale claims, whether with or without merit, thereby avoiding the oppressive results which would otherwise often follow after witnesses are unavailable, or after unavoidable events have transpired precluding the assertion of what might have otherwise been a good defense. It would therefore not be in harmony with the reason and spirit of the law to hold the statute unavailable merely because it may be alleged in the answer that the claim is without merit. Defenses may be deemed inconsistent only when they are so contradictory to each other that one of them must necessarily be false. In this case, if the defendant did not owe plaintiff, yet under the affirmative allegations in the answer, the statutory bar may be urged against him; while, if the claim is in fact meritorious, such time has elapsed since plaintiff's rights thereto matured as to constitute a bar to his remedy. Both may be true, and, if so, defendant should be permitted to frame his answer accordingly: *Snodgrass v. Andross*, 19 Or. 236 (23 Pac. 969).

2. The next question for determination is as to whether, under the facts admitted by the pleadings, plaintiff's claim is barred under B. & C. Comp, § 6, which provides that an action upon a contract or liability, express or implied, must be brought within six years from the time the cause of action accrues. It is admitted by the pleadings, in effect, that, while the complaint was filed two days before the expiration of the statutory period, the summons was not served nor filed until 10 months thereafter. It is provided by Section 51:

"Actions at law shall be commenced by filing a complaint with the clerk of the court, and the provisions of Sections 14 and 15 shall only apply to this subject for the purpose of determining whether an action has been commenced within the time limited by the code."

It is also added that summons may be served on the defendant at any time thereafter. Section 14 states that an action shall be deemed commenced when the complaint is filed and the summons served; and in Section 15 it is provided that an

attempt to commence the action shall be deemed equivalent to its commencement, when the complaint was filed and summons delivered with the intention that it shall be actually served by the sheriff or other officer of the county in which the defendants or one of them usually or last resided; "but such an attempt shall be followed by the first publication of the summons or service thereof within 60 days." It is conceded here that no service in person or attempted publication of summons was made within that time, but argued by plaintiff's counsel that there is a distinction between the "limitation" of actions and "commencement" of actions; that Sections 14 and 15 apply only for the purpose of determining whether the action has been commenced within the time limited by the code, and designates the relations only that exist between the defendants, specifying the respective rights as between themselves; and that these sections in no manner place any restrictions on Section 51. The sections of the statute alluded to are all included in an act entitled "A bill to provide a Code of Civil Procedure," adopted in 1862. Being included in the same act and adopted at the same time, they must necessarily be considered together, and such construction be given thereto, if possible, that all the provisions of each of the sections may be made effective: *State v. McGuire*, 24 Or. 366 (33 Pac. 666: 21 L. R. A. 478).

3. We think, however, that the language is plain and unambiguous, leaving no room for construction; and when the language is clear we have no discretion but to adopt the meaning which it imports: *Phelps v. Racey*, 60 N. Y. 10 (19 Am. Rep. 140).

4. Section 51 clearly states that Sections 14 and 15 of B. & C. Comp. can apply only for the purpose of determining whether the action has been commenced within the time prescribed by the code, and not for any other purpose. In any other case it is manifest that the filing of a complaint is sufficient, and the summons may be filed as there stated, provided it be filed within the time limited, where the question arises

as to whether the action is barred by Section 6 of the statute, in which event it is expressly provided that the service must be made within 60 days from the filing of the complaint. It being admitted the summons was not served, filed, or in any manner attempted to be served or filed, nor publication thereof attempted, until 6 years and 10 months after the cause of action matured, it necessarily follows that the action was not commenced within the time required: 1 Enc. Pl. & Pr. p. 136; *Burns v. White Swan Min. Co.*, 35 Or. 305 (57 Pac. 637); *Smith v. Day*, 39 Or. 531 (64 Pac. 812: 65 Pac. 1055).

Other points are suggested in the record, but not urged here; nor do we deem them material. The judgment of the court below should be affirmed.

AFFIRMED.

Argued 17 April, decided 9 July, 1907.

HUME v. BURNS.

90 Pac. 1009.

BOUNDARY DISPUTE—INJUNCTION—REMEDY AT LAW.

1. A suit for an injunction to restrain a trespass should not ordinarily be used to determine a disputed boundary line, such an injunction being sparingly used because the plaintiff has usually a remedy at law or an equitable remedy by a suit to determine a disputed boundary, both which are less severe than the remedy by injunction.

INJUNCTION AGAINST TRESPASS—INSOLVENCY OF DEFENDANT.

2. The insolvency of defendant is not reason for entertaining a suit to enjoin a trespass, where the main purpose is to determine a boundary line and obtain possession of real property.

EQUITY—JURISDICTION—WAIVER OF OBJECTION.

3. Where defendant, in a suit in equity, answers to the merits and asks equitable relief, he should not be permitted thereafter to question the jurisdiction on the ground of an adequate remedy at law; but, where the facts necessary to give jurisdiction are stated in the complaint but denied in the answer, without a prayer for affirmative relief, the question becomes one of fact, and is not waived by answering to the merits, and if want of jurisdiction appears during the trial the suit should be dismissed.

JUDGMENT AS AN ESTOPPEL.

4. A judgment for plaintiff, in an action of trespass, is only evidence that the title to some part of the premises was in the successful party, and, before he can avail himself of such judgment as an estoppel in another proceeding, he must show on what part of the premises the trespass was committed, and then apply the issue and judgment to the premises in controversy in the suit to enjoin.

From Curry: JAMES W. HAMILTON, Judge.

Statement by Mr. CHIEF JUSTICE BEAN.

This is a suit by R. D. Hume against E. B. Burns to enjoin a trespass on real property. It is alleged that the plaintiff is the owner in fee of the property in question; that for about months prior to the commencement of this suit, the defendant, without right, unlawfully, vexatiously and willfully entered upon such premises, and deposited and kept thereon ^{net} racks and other fishing appliances, and lodged and cleaned ^{fish} thereon, and at various times occupied and used the premises as his own; that on or about the 11th day of February, 1903, he dug a trench or drain thereon to empty a pond, partly on plaintiff's land and partly on adjoining land; that defendant had assembled building material upon such premises, and commenced the construction of a building; that on October 13, 1903, plaintiff commenced an action at law against him to recover damages for certain trespasses committed; and that defendant is insolvent and unable to answer in damages. The defendant answered, denying all the material allegations of the complaint, and for an affirmative defense pleaded that the alleged acts of trespass were not committed upon plaintiff's land. After issue joined, the cause was referred to a referee to report the testimony. Pending the hearing before the referee, the plaintiff, by leave of the court, filed a supplemental complaint, alleging that, since the commencement of the suit, such proceedings had been had in the action of trespass, mentioned in the complaint, that plaintiff recovered a judgment therein against defendant for \$25 damages. A demurrer to the supplemental complaint was sustained, the cause tried on evidence, as reported by the referee, and a decree rendered in favor of defendant, dismissing the suit for want of jurisdiction. From this decree, plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *R. H. Countryman* and *W. C. Hale*, with an oral argument by *Mr. Hale*.

For respondent there was a brief over the names of *Hall & Hall*, *Robert Burns*, and *Michael G. Munly*, with oral arguments by *Mr. John F. Hall* and *Mr. Munly*.

Opinion by MR. CHIEF JUSTICE BEAN.

The only material question in this suit is the location of the southeasterly line of plaintiff's premises. Plaintiff owns a narrow strip of rocky and sandy beach land along and in front of the Town of Ellensburg, and extending to the Rogue River on the north. It is uninclosed and unimproved, and valued chiefly because it affords access to the waters of the river. In 1903, the defendant, who was engaged in taking salmon in the river for commercial purposes, used this land as a landing for boats and nets in connection with his business; but such use did not substantially injure plaintiff's estate. Before the commencement of this suit, he purchased or leased a tract of land south of and adjoining plaintiff's land, and in February, 1903, began to assemble material for the purpose of erecting a salt-house. Plaintiff, claiming and alleging that defendant proposed to construct such salt-house on his land, commenced this suit to enjoin him from so doing. Upon the filing of the complaint, a temporary injunction was issued and served upon defendant, whereupon he changed the location of his proposed building to a place outside of the boundary line of plaintiff's premises, as, he claims, the same was pointed out to him by plaintiff's attorney, and thereafter completed such building. It is now asserted by the plaintiff that the building is either wholly or partly on his premises, while the defendant's position is that it is outside of such boundary and on land bordering plaintiff's premises. This is the only question sought to have determined in this suit. The other acts of trespass charged in the complaint have either not been proved, or, as we must assume, are not considered by plaintiff sufficient to entitle him to injunctive relief, since no mention is made of them in the briefs, and no particular prominence given them in the argument. The only question then, as we take it, to be determined in this case, is the title to land upon which defendant's building is situated, and this depends upon the location of the boundary thereof.

1. Now, the law is that a suit to enjoin a trespass cannot

be used as a substitute for a proceeding to try the legal title to real property or to establish the boundary thereof. An injunction will not issue to restrain a trespass upon real property, unless the acts committed or threatened by the defendant will result in irreparable injury to the estate of the plaintiff, or are such as must necessarily lead to oppressive litigation or a multiplicity of suits. "The practice of granting injunctions in cases of trespass," said Mr. Justice LORD, "is of comparatively modern origin, and is a jurisdiction sparingly indulged, and only upon a state of facts which show that the injury would be irreparable, and the remedy at law inadequate to redress the wrong or injury complained of. When the nature of the trespass is such as must necessarily lead to oppressive litigation or a multiplicity of suits, or the injury goes to the destruction of the estate in the character in which it is enjoyed, or the trespass cannot be adequately compensated in damages, and the remedy at law is plainly inadequate, a court of equity, in such or like cases, is authorized to interfere and grant relief by injunction. But the general doctrine, well established by the authorities, is that a court of equity will not grant an injunction to restrain a mere trespass, where the injury complained of is not irreparable, and destructive of the plaintiff's estate, but is susceptible of pecuniary compensation, and for which he may obtain adequate satisfaction in the ordinary course of law": *Smith v. Gardner*, 12 Or. 221 (6 Pac. 771: 53 Am. Rep. 242). To the same effect: *Mendenhall v. Harrisburg Water Co.* 27 Or. 38 (39 Pac. 399); *Parker v. Furlong*, 37 Or. 248 (62 Pac. 490); *Moore v. Halliday*, 43 Or. 243 (72 Pac. 801: 99 Am. St. Rep. 724). It is clear, therefore, that the question sought to be litigated in this suit cannot be determined in an action to enjoin a trespass, because the plaintiff has a complete and adequate remedy at law or by a suit in equity to establish a boundary.

2. It is alleged in the complaint that defendant is insolvent, and unable to respond in damages; but this, of itself, is no ground for relief in equity in a suit of this character: *Parker*

v. *Furlong*, 37 Or. 248 (62 Pac. 490); *Moore v. Halliday*, 43 Or. 243 (72 Pac. 801; 99 Am. St. Rep. 724); *Warlier v. Williams*, 53 Neb. 143 (73 N. W. 539). The object of the suit is to determine the title to and obtain possession of real property, and this may be secured by an ordinary action at law, and the insolvency of the defendant does not give a court of equity jurisdiction.

3. It is also claimed that the defendant waived the question of jurisdiction by answering to the merits. Where a defendant in a suit in equity answers to the merits, and asks equitable relief, he cannot thereafter question the jurisdiction on the ground that the plaintiff has an adequate and complete remedy at law (*Municipal Security Co. v. Baker County*, 33 Or. 338: 54 Pac. 174; *Kitcherside v. Myers*, 10 Or. 21; *Larch Mountain Invest. Co. v. Garbade*, 41 Or. 123: 68 Pac. 6); but where, as here, facts necessary to give a court of equity jurisdiction are stated in the complaint, and denied by the answer, the question becomes one of fact, and is not waived by answering to the merits, and, if the want of jurisdiction appears during the trial, the suit should be dismissed: *Love v. Morrill*, 19 Or. 545 (24 Pac. 916); *Union Power Co. v. Lichty*, 42 Or. 563 (71 Pac. 1044).

4. It is also contended that the defendant is estopped to deny plaintiff's title to the land upon which the salthouse is located, because of the judgment in the action of trespass brought against him by plaintiff. But the judgment in that action is only evidence that the title to some part of the premises described in the complaint was in the plaintiff, and before he can avail himself of such judgment as an estoppel in another action, he must show by evidence on what part of the premises the trespass was committed, and then apply the issue and judgment to the premises now in controversy: *Abraham v. Owens*, 20 Or. 511 (26 Pac. 1112).

For these reasons, the court below, in our opinion, was right in dismissing the suit, and its decree is affirmed.

AFFIRMED.

Argued 10 July, decided 30 July, 1907.

LOOMIS v. MAC FARLANE.

91 Pac. 466.

WORDS—ASCERTAINING MEANING.

1. The meaning of a word may be varied by the text in which it is found, and if that does not fix it, resort may be had to parol testimony to ascertain the surrounding circumstances and thereby determine the intention of the parties.

MEANING OF "EARNINGS" CONSIDERED.

2. The word "earnings" may mean either gross or net receipts, but in the present instance it is used to indicate net returns.

CONTRACTS—CONSTRUCTION AGAINST PARTY USING WORDS.

3. Where the true meaning of a written instrument is doubtful, it should be construed most strongly against the party who used the doubtful terms.

GUARANTY—CONSTRUCTION—PARTICULAR WORDS—EARNINGS.

4. A contract providing that, whereas guarantor had sold all the tools used in operating a log boom, together with the management thereof, and guaranteed that vendee should be secure in continuing the management thereof until the sum specified should be earned to vendee, that therefore guarantor and his surety agreed to pay vendee such sum less the amount earned, and signed by guarantor and his surety alone, meant that the net earnings of the management of the log boom and not the gross earnings were guaranteed to amount to the sum specified.

GUARANTY—CONDITION PRECEDENT—COMPLIANCE.

5. The condition of a guaranty that the earnings from the management of a log boom would amount to a sum specified provided that the guarantee should conduct the same in a faithful, business and workmanlike manner, was complied with, where the person guaranteed gave to the management of the boom his personal attention and rendered such reasonable personal services as he was able and qualified to render.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Statement by MR. COMMISSIONER SLATER.

This is a suit by L. E. Loomis against Fred MacFarlane and George L. Colwell to reform a written contract and to enforce it when reformed. For about two years immediately prior to December 1, 1904, defendant MacFarlane had been operating a log boom at Ilwaco, State of Washington, where logs were formed into rafts for the purpose of being towed by the owners to Portland in this State. The boom was owned and had been kept in repair by the Ilwaco Railway & Navigation Co., a corporation, which brought logs by its railroad from the forests to the river bank where the boom was located. MacFarlane, by the consent of the company, had been exercising the exclusive

management of the boom, and had been collecting from the owners of the logs 20 cents per 1,000 feet of the logs rafted, which sum he retained as his compensation for his trouble and expense. Desiring, however, to quit the business, and to go elsewhere and engage in other business, he agreed to sell to plaintiff, on the date mentioned, his rights and privileges in the rafting of logs in this boom, and his tools and appliances used in that business, for the aggregate consideration of \$500, and in pursuance thereof gave to plaintiff the following contract of guaranty, with defendant Colwell as a surety:

"This Contract Note and Guaranty made and entered into by and between Fred MacFarlane and George L. Colwell, as parties of the first part, and L. E. Loomis, as party of the second part, witnesseth: That,

Whereas, Fred MacFarlane, one of the said parties of the first part, has sold unto the said L. E. Loomis, the said party of the second part, all of the tools and appliances used in operating the Ilwaco log boom, at Ilwaco, Washington, together with the management thereof, and the handling and rafting all of the logs put therein from and after the 1st day of December, 1904, at the rate of 20 cents per thousand, including all emoluments from the said 1st day of December, 1904, in consideration of the sum of \$500.00, and guarantied to the said second party that he, the said second party, shall be secure in continuing the said management thereof, at the same rate until the said amount of \$500.00 less the sum of \$25.00, the value of said tools and appliances, is earned to the said second party, said sum of \$500.00 having been advanced and paid down cash in hand by said second party to said Fred MacFarlane, one of said first parties.

Now, Therefore, in consideration of said sum or balance of \$475.00 advanced as aforesaid by said party of the second part to said Fred MacFarlane, one of the said parties of the first part, and the further consideration that said party of the second part shall conduct the said management of said log boom in a faithful, business and workmanlike manner, we, the said Fred MacFarlane and George L. Colwell, the said parties of the first part, do hereby promise and agree to pay to the said L. E. Loomis, the said \$475.00, if he is prohibited from taking charge of and managing said log boom; or in case that he takes charge and manages said log boom and earns therefrom then

to pay him such part of said \$475.00 less such amount as is earned therefrom.

And it is Further Understood that, in case that the present rate of 20 cents per thousand feet, board measure, for rafting logs therefrom, is cut, then this guaranty to become payable on demand for any unearned portion of said amount advanced, and in case suit or action is brought to collect any balance, then we further agree to pay in addition such amount as the court may adjudge reasonable as attorney's fees.

Dated this 19 day of December, 1904.

Fred MacFarlane.

Signed in the presence of
J. J. Brumbach."

George L. Colwell.

After setting out the foregoing contract, plaintiff alleges, in effect, that it was a part of the agreement of sale that the earnings therein referred to should be net earnings made out of the business by August 1, 1905, and that, in case the amount specified should not have been so earned by that time, MacFarlane was to pay to plaintiff that amount or the deficiency, whatever it may be; that by inadvertence and mistake of the parties that part of their agreement was omitted from the writing evidencing their contract; that plaintiff had fully performed his part of the contract; that the necessary expense of conducting the business exceeded the income up to August 1, 1905, and plaintiff had derived therefrom no income whatever; that he has demanded of defendants the payment to him of the sum of \$475, which has been refused, and that \$75 is a reasonable attorney's fee to be allowed him, under the terms of the contract. He prays for a decree reforming the instrument in the two particulars mentioned, and, when reformed, that it be enforced by granting him a money judgment against defendants. Defendants by their answer admit the execution and delivery of the written contract set out in the complaint, and also that it was a part of the agreement of sale that the amount of the earnings mentioned was to be ascertained by the parties on August 1, 1905; but they deny that the earnings were to be net earnings, as well as deny all other allegations of the complaint. They affirmatively allege that the written instru-

ment set forth in the complaint evidences the exact agreement had and entered into by the parties in every particular, excepting that it was understood that the \$475 mentioned should be earned on or before August 1, 1905, and that, from the business sold him, plaintiff had earned and collected between December 1, 1904, and August 1, 1905, more than the sum of \$500, and by reason thereof he has received fulfillment of the terms of the contract sued on; that plaintiff was inexperienced and incompetent and intrusted his business to others when he should have managed the same himself, and give the business his personal attention; and that he was grossly extravagant and made large and unnecessary expenditures of money for the hire of labor, and that the loss which he may have sustained was due to his own incompetent and extravagant management. The reply traverses all the affirmative matter of the answer, except as alleged in the complaint. Upon the taking of testimony the court found in accordance with plaintiff's allegations, decreed the reformation of the instrument, and entered judgment accordingly, from which defendants appeal.

AFFIRMED.

For appellants there was a brief over the name of *Johnson & Duff*, with an oral argument by *Mr. George Arthur Johnson*.

For respondent there was a brief and an oral argument by *Mr. Thomas Nelson Strong*.

Opinion by MR. COMMISSIONER SLATER.

The answer admits the necessity of reforming the instrument set forth in the complaint so that it will require the amount of earnings therein guarantied shall be ascertained on August 1, 1905; but it denies that the \$475 guarantied by the contract were to be net earnings, and also denies that the business was carried on by plaintiff in a faithful, business and workmanlike manner, as required by the contract. The equitable jurisdiction to reform the instrument in that respect is, therefore, admitted, but it remains for us to determine the extent of the relief to be otherwise granted. In order to determine the

rights of the parties and grant the relief to which we think they are entitled, in the view we take of the matter in controversy, it will not be necessary to reform the instrument further than to the extent admitted by the pleadings.

1. The word "earnings" may mean either gross or net receipts of a business, or of the income of a laborer, according to the connection in which it may be used, and which of these two meanings is to be given the word as used in this contract is a question of construction. If the meaning to be given it is not ascertainable from the context, and if it is doubtful what was meant and intended by the parties, resort may be had to parol testimony to ascertain the surrounding circumstances and from such facts ascertain the intention of the parties, which must prevail.

2. The instrument on which the suit is based recites: (1) That MacFarlane has sold some tools and appliances in operating the Ilwaco log boom, and the handling of all logs put therein after December 1, 1904, in consideration of \$500 paid to him; but it does not appear from the testimony of the parties that MacFarlane had any rights of property in the boom, which were subject to assignment and transfer to another, and the only rights of property transferred were the tools and appliances, valued by the parties in the sum of \$25. (2) That MacFarlane guaranteed to plaintiff that he should be secure in continuing the management of the boom at the same rate of compensation the former had been receiving, until the amount of \$500 less the sum of \$25, the value of the tools and appliances, is earned to plaintiff. The language "to plaintiff" evidently means something more than that the earnings are to be merely the gross receipts of the business, but that the amount earned is to be personal to him, that is, a profit after paying all other charges. In the contract proper, however, the defendants had agreed "to pay him [plaintiff] such part of said \$475 less such amount as is earned therefrom." It might be proper, also, at this point, to mention the fact that this instrument recites that MacFarlane had sold the property de-

scribed to plaintiff, and that the latter had advanced and paid to the former the sum of \$500; but the evidence on the part of plaintiff shows, and it is not denied by the defendants, that, while the terms of the contract of sale had been previously agreed upon, yet the sale was not consummated, and the money was not paid over to MacFarlane until the instrument in question had been signed and delivered, so that the contract in suit was made in contemplation of the contract of sale.

In construing the word "earnings," as used in the statute of Wisconsin, exempting 60 days' earnings of a debtor for his personal services from execution and attachment, when necessary for the support of his family, Mr. Chief Justice DIXON, in *Brown v. Hebard*, 20 Wis. 344 (91 Am. Dec. 408), says: "It is not easy, perhaps, to determine the precise application of this word as used in the statute. I think a correct definition to be the gains of the debtor derived from his services or labor without the aid of any capital. If the debtor has no capital, and no credit contributing to increase his profits, except the credit arising from the labor or services in which he is presently engaged, and out of the proceeds of which his obligations on account of such labor or service are to be discharged, then I think his net receipts or gains from such labor or services may fairly be accounted 'earnings.' If, for example, the man whose business it is to dig a well, sink a mine, erect a house, run a raft of lumber or a ferry-boat, or to perform any of the numerous kind of work in which the assistance of others is necessary, employs others, as he must do, to assist him, and who are to be paid as he himself is paid, out of the proceeds of the work, it seems to me that what remains after the others are paid must be regarded as his 'earnings.'" See, also, *Campfield v. Lang* (C. C.) 25 Fed. 128.

3. The instrument in suit, it will be observed, is not signed by plaintiff, but by the defendants only, and hence the language thereof is the language of the defendants, and this fact is of some importance in construing the instrument. "Where the true import and meaning of a written instrument is doubt-

ful, and the intention of the parties cannot be determined from its language, the right doctrine is that it should be construed most strongly against the person using the doubtful language, and in favor of him who has been misled and advanced his money upon it: *Barney v. Newcomb*, 9 Cush. 46; *McFadden v. Friendly*, 9 Or. 222.

4. Upon the face of the instrument, then, it seems to us, the parties intended net profits when using the word "earnings." But if there was any doubt remaining upon that point to be resolved by a resort to parol testimony, the conclusion is irresistible from the consideration of defendant MacFarlane's evidence alone that such was the intendment of the parties. He says: "I guarantied that if he went in there he would make \$500 in that seven months, provided he done it in a business-like manner." And it appears from all of the evidence that it was understood by the parties when making their contract the plaintiff was to have an assurance of a return of his money from the net proceeds of the business, and we so interpret their contract.

5. It remains to be considered whether plaintiff has conducted the management of the business "in a faithful, business and workmanlike manner," as provided in the contract so as to entitle him to recover. Just what this phrase means is somewhat uncertain. Defendants contend that plaintiff should have attended to the rafting of the logs himself, and that it was reasonably possible for a person skilled in that work to have rafted all the logs delivered there in the seven months without the aid of others, and they have offered testimony that tends to support that claim. But the contract does not require him to do that. He has agreed, or rather defendants have required of him, as a condition to the guaranty, that he shall "conduct the management" of the boom, which does not necessarily mean that he shall do the work himself. He has complied with that condition when he has shown that he gave to the management of the boom his personal attention and by rendering such reasonable personal services thereabouts as he was

able and qualified to give. Plaintiff was not an experienced raftsmen and for about two years preceding the date of the contract had been a clerk or agent for the Ilwaco Railway & Navigation Co., at Ilwaco. MacFarlane had been acquainted with plaintiff during all that time, and prior to the making of the contract plaintiff made no representations to him that he was a raftsmen. Under these circumstances, then, MacFarlane had no right to assume that plaintiff was skilled in rafting logs; and, in fact, he did not act on that assumption. for he says he did not know whether plaintiff was skilled in that work or not.

The testimony shows quite clearly that plaintiff assiduously attended to the care of the boom, giving it his undivided personal attention, and performing such work as he was able to do, and, in fact, during the last three months he performed all of the work himself. During the first four months of the period, when he needed assistance, he employed the same men MacFarlane had employed to assist him when he turned over the management of the boom to plaintiff on December 19, 1904, and he paid them the same wages. So that we think the business was managed by plaintiff in a faithful and reasonably businesslike manner. It is not claimed by defendants that the work was not done in a workmanlike manner, or that any loss was occasioned by any neglect or deficiency in that respect. It appears from the evidence that at the time of the transfer the railroad company was under a contract to deliver 2,000,000 feet of logs at the boom each month until August 1, 1905, and that was the reason the contract of guaranty was made to terminate at that time. But, soon after the making of the contract, the railroad company failed from some unexplained reason to make delivery of more than about 500,000 feet, on an average, per month. This was the cause of plaintiff failing to make the anticipated profits. The evidence shows that the total receipts were \$534.55, while the total expense was \$747.55, that is, the actual operating expense exceeded the entire income by \$247.14.

It follows that the decree of the circuit court should be affirmed.

AFFIRMED.

Argued 31 July, decided 27 August, 1907.

WESTMAN v. WIND RIVER LUMBER CO.

91 Pac. 478.

MASTER AND SERVANT—DUTY TO PROVIDE SAFE PLACE TO WORK.

1. Where it can be done at a reasonable expense, and without interfering with the conduct of the business, a master is under obligation to cover or protect dangerous machinery, under the general duty to provide a reasonably safe place for the employees to work.

SAME—ASSUMED RISK OF EMPLOYMENT.

2. Though a master is primarily bound to guard dangerous machinery in the exercise of ordinary care, the servant may dispense with the performance of such duty by consenting to work at a place which will expose him to danger, knowing and fully comprehending the risk incurred.

SAME—EVIDENCE IN REBUTTAL.

3. Where plaintiff, an oiler in defendant's mill, claimed to have been injured by the slipping of a plank in a platform constructed for his use, while it was defendant's theory that plaintiff was not performing his duties at the time he was injured, but was handling a loose conveyor belt, which had been removed from its pulley, and that it became entangled in the shaft while plaintiff was holding it, thereby causing the injury, plaintiff could prove in rebuttal that such conveyor belt was frayed at the edges, in order to warrant an inference that the belt was likely to get caught and wound around the shaft without human aid.

INJURY TO YOUTHFUL EMPLOYEE—DUTY OF WARNING.

4. It is the duty of an employer to warn a new employee who is to work around dangerous machinery of the dangers to be guarded against, unless they are obvious and appreciable to one of his age and experience.

Where plaintiff, a lad between 15 and 16 years old, had been employed as an oiler in defendant's sawmill shortly before his injury and was without experience in such work, defendant was bound to warn him of the danger incident to his employment and the risks attending it, unless such danger was open and apparent to one of plaintiff's age, experience and capacity, in the exercise of ordinary care and prudence.

SAME—ASSUMED RISK—QUESTION FOR JURY.

5. In an action for injuries to an inexperienced servant while performing his duty about dangerous machinery, the question whether the dangers of his employment were so open and obvious that he assumed the risk thereof was for the jury.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a personal injury action by David Westman against the Wind River Lumber Co. Plaintiff was engaged as oiler in defendant's sawmill, was caught in the machinery and severely injured. At the time of the accident he was between 15 and 16 years of age. About a year prior to that time he had worked for defendant for a few months piling slabs and wheel-

ing sawdust, but had nothing to do with the machinery in the mill. He applied for re-employment two or three weeks before the accident, and wanted \$2 a day, but the foreman told him that defendant was not paying "kids" more than \$1.75 a day, and if he was satisfied with such wages he could go to work as oiler, and the engineer would show him where the oil can was. He had never worked as oiler in a mill before, and was given no instructions as to his duties or warned of the dangers incident thereto. He oiled the first afternoon and a short time the next morning, when he was ordered to pile slabs, and continued at that work until about a week before the accident, when he was again put to oiling. In the basement of the mill, and 4 or 5 feet from the ground, is a line shaft 2.16 inches in diameter, upon which were several pulleys, from which belts extended to the machinery on the floor above. One of these pulleys was 40 inches in diameter, and 19½ inches from it was a 4-inch belt running from the main shaft to a pulley near the floor above to operate a conveyor for the refuse from the lath saw. A few inches further along, and 3 or 4 feet above the shaft, was a conveyor box, and beyond that, and 38½ inches from the main pulley, was another pulley on the shaft. A short distance above the main shaft was a tightener frame, with a pulley 20 inches in diameter, used for tightening the belt leading from the main pulley to a bolter saw above. The distance from this tightener frame to the conveyor referred to was about 19 inches. A platform upon which the workman stood when oiling the machinery, and especially the tightener pulley, was 28½ inches in front of the main shaft and about 3 feet from the ground. As originally constructed this platform was made of two planks, each 2 inches in diameter, 12 inches wide, and 12 feet long, supported by brackets extending from near-by posts; but the evidence tended to show that at the time of the accident there was but one plank in use and it was unfastened. The oil cup on the tightener pulley was 12 or 14 inches in front of, and about 5 feet 6 inches above, the platform, and almost, if not quite, directly over the main pul-

ley. On the morning of the accident the foreman told plaintiff that the tightener pulley shaft was a new one, and for him to watch and screw down the oil cup whenever it got hot.

Plaintiff testified that, to reach the oil cup, he had to stand on his tiptoes on the board referred to, support himself by holding with one hand to the tightener frame, which was moving back and forward over a space of 5 or 6 inches, thrust his head and shoulders between the tightener frame and the conveyor, and then reach around an 8-inch projecting timber with the other hand to the oil cup. About 10 o'clock that morning, while the mill was in operation, he had occasion to tighten the oil cup; but for some reason it worked hard, and, while he was standing on the platform, as above stated, exerting himself to screw it down, the platform slipped, precipitating him forward into the belts and pulleys, severely injuring him. He brings this action, by his guardian *ad litem*, to recover damages for the injury so received, alleging that defendant was negligent in not furnishing him a safe place in which to work, in not protecting, guarding or fencing the machinery about which he was to work, in not instructing him how to perform his duties with safety, and in not warning him of the dangers incident to his employment. Defendant denied the negligence charged, and as a defense pleaded assumption of risk and contributory negligence. Plaintiff had verdict and judgment, and defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *William David Fenton* and *R. A. Leiter*, with an oral argument by *Mr. Fenton*.

For respondent there was a brief over the name of *Long & Sweek*, with an oral argument by *Mr. Joel Minor Long*.

Opinion by MR. CHIEF JUSTICE BEAN.

1. The first assignment of error is based on the admission of testimony tending to show that defendant could have guarded or protected the machinery about which plaintiff was working at the time of the accident at slight expense and without inter-

was employed. It was defendant's duty, therefore, to point out or give him notice of the danger incident to his employment and the risks attending the same (4 Thompson, Negligence, § 4091; 20 Am. & Eng. Enc. Law, 2 ed., 97), unless they were so open and apparent that one of his age, experience and capacity, in the exercise of ordinary care and prudence, should know and appreciate them to the same extent as an adult, and that was a question for the jury: *Avery v. Meek* (Ky.), 45 S. W. 355.

5. And, finally, it is contended that the court erred in overruling defendant's motion for a nonsuit and in refusing to direct a verdict on the theory that the dangers attending plaintiff's employment were open and obvious, and he was bound as a matter of law to know and appreciate them. But, as we have said, plaintiff was not only a minor, but an inexperienced workman, and therefore it was a question for the jury whether the dangers were open and obvious to a person of his age and experience: *Bowers v. Star Logging Co.* 41 Or. 301 (68 Pac. 516); *Dubiver v. City Ry. Co.* 44 Or. 227 (74 Pac. 915, 75 Pac. 693); *McDonald v. O'Reilly*, 45 Or. 589 (78 Pac. 753); *Mundhenke v. Oregon City Mfg. Co.* 47 Or. 127 (81 Pac. 977; 1 L. R. A. (N. S.) 278); *Foley v. California Horseshoe Co.* 115 Cal. 184 (47 Pac. 42; 56 Am. St. Rep. 87); *Jenson v. Will & F. Co.* 150 Cal. 398 (89 Pac. 113).

Finding no error in the record, judgment is affirmed.

AFFIRMED.

Argued 17 July, decided 27 August, 1907.

STATE v. WALTON.

13 L. R. A. (N. S.) 811; 91 Pac. 490.

APPEAL—PRESUMPTION OF VERITY OF RECORD.*

1. While the records of a court may be amended, if necessary, to make them conform to the truth, it must be presumed that the record as presented by the transcript correctly shows what and all that occurred in the matter under consideration.

*NOTE—See also, on this point, *State v. McCaffrey*, 26 Or. 570 (38 Pac. 932); and *Ollschlager's Estate*, 50 Or. 55 (80 Pac. 1049.)

CRIMINAL LAW—NOT DUTY OF DEFENDANT TO ASK TO PLEAD.

2. In a criminal case defendant is not obliged to demand an opportunity to plead, but it is the imperative duty of the prosecuting officer to call upon him to do so.

CRIMINAL LAW—NECESSITY OF GUARDING RIGHTS OF DEFENDANT.

3. The public has an interest in the life and liberty of all persons accused of crime, and in criminal proceedings those steps which the law prescribes cannot be dispensed with or modified even with the express consent of the accused.

CRIMINAL LAW—NECESSITY OF ARRAIGNMENT AND PLEA.*

4. Under Section 1328, B. & C. Comp., requiring one charged with a crime to be arraigned and to be asked whether he pleads guilty or not guilty, and Section 1364, providing for entering the plea, it is essential to a conviction of a felony that the defendant be arraigned and that he plead or refuse to plead, though the defendant may not be affected in any degree by failing to plead.

From Multnomah: JOHN B. CLELAND, Judge.

Charles W. Walton was convicted under an indictment charging assault and robbery, and appeals. REVERSED.

For appellant there was a brief and an oral argument by *Mr. Henry St. Rayner*.

For the State there was a brief over the names of *A. M. Crawford*, Attorney General, *John Manning*, District Attorney, and *Gustavus Charles Moser*, with an oral argument by *Mr. Moser*.

Opinion by MR. COMMISSIONER KING.

On September 1, 1904, an information was filed by the district attorney against defendant, Chas. W. Walton, charging him with assault and robbery of one Emmanuel Johnson. It appears from the record that on the following day the information was read to defendant and a copy thereof handed to him, after which, on his request, he was given two days in which to plead. On the day fixed to plead a demurrer was filed, which, on October 5th following, was overruled, succeeded three weeks later by defendant's trial and conviction. After verdict, written objections to the sentence were filed, on the ground that defendant had not been fully arraigned, not having at any time answered, nor been given an opportunity to answer, as to

*NOTE.—See extensive annotation in 13 L. R. A. (N.S.) 811-816: Effect Upon Conviction of Failure to Give Accused an Opportunity to Plead. REPORTER.

whether he was guilty or not guilty, which were overruled, and defendant sentenced to 20 years' imprisonment.

It is immaterial whether the motion filed was intended as a motion in arrest of judgment, or an objection to further proceedings, as its contents are sufficient to call the court's attention to the alleged irregularity in the trial, and to constitute an objection to the imposition of the sentence pronounced. We are then confronted with the question as to whether the entry of a plea on behalf of the defendant is essential to the trial of one accused of felony. Defendant made no objection to the irregularity complained of until after verdict, nor does it affirmatively appear that an entry of a plea would have affected the result, or that defendant was in any manner prejudiced by the oversight. The record not only fails to disclose that any plea was entered, but it appears from affidavits in the record that he was not asked whether he desired to enter a plea of guilty or not guilty, and that at no time during the trial did defendant refuse to plead. It is urged by counsel for the state, and held by the learned court below, that such plea is not essential where no objections are made thereto during the trial, and that the alleged error is of no avail to defendant unless it appears from the record that he lost some rights by reason of a plea not having been entered. Section 1328, B. & C. Comp., indicates what shall constitute an arraignment, and is as follows:

"The arraignment must be made by the court, or by the clerk or the district attorney under its direction, and consists in reading the indictment to the defendant, and delivering to him a copy thereof and the indorsements thereon, including the list of witnesses indorsed on it or appended thereto, and asking him whether he pleads guilty or not guilty to the indictment."

It appears from the record that all the requirements of this provision were complied with, except the record does not disclose that defendant was asked "whether he pleads guilty or not guilty to the indictment."

1. If essential to a conviction of a felony that such plea must be entered before proceeding to trial, the same rule would

necessarily apply with reference to the requirements of the record of the proceedings in this respect, as under the statute making the presence of the defendant necessary during the proceedings. The rule is settled in this State that this fact must affirmatively appear in the record of the trial: *State v. Cartwright*, 10 Or. 193; *State v. Gilbert*, decided May 14, 1883 (unreported). In the latter case two indictments were filed against the defendant, accusing him of murder. With the exception of the names of the persons alleged to have been murdered, there was no difference in the indictments. The defendant was tried under both indictments at the same term, convicted and sentenced to death; but in the journal entry of the judgment the clerk neglected to state any crime for which the conviction was had, nor was there any record of the trial indicating upon which of the indictments the defendant was tried while both appeared in the transcript of the judgment roll. In passing upon the record, Mr. Chief Justice WATSON says: "It has been suggested that this court should presume that the proceedings in the court below were regular, and that the duplicity in the record has occurred through the inadvertence or mistake of the clerk in making up the judgment roll, of which the record before us is simply a transcript. But this judgment roll, although prepared by the clerk, is the record of the court. To it alone can we look to ascertain what the action of the court below was, and upon it determine whether any error was committed. The duty of the clerk in such matters is ministerial undoubtedly, and subject to the supervision and control of the court. But his record is the highest record of the judicial action of the court. It imports verity, and, until impeached by the court itself, is conclusive of the matters to which it relates: *Schirmer v. People*, 33 Ill. 276." The court accordingly held that no conditions could be presumed to exist other than as appear in such record; that the record might be amended to conform to the facts (where no adverse rights have intervened), but, since this had not been done, it would be presumed that no record of such proceedings could be made

other than as there disclosed. It follows under the decisions referred to that it is unnecessary for us to determine whether the affidavits in the record can be considered, since the record fails to disclose that Walton was given an opportunity to answer as to whether he was guilty or not guilty, or refuse to do so. His rights will, therefore, be determined under the record before us without reference to the affidavits, and it will accordingly be presumed that no plea was either made or refused.

The Criminal Code of this State provides:

"If the demurrer be disallowed, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow; but if he do not plead, the judgment must be given against him." B. & C. Comp. § 1364.

A demurrer was filed by the defendant, and, after it was overruled, had he refused to plead, this provision of the statute would require judgment to have been given against him. Our statutes have these further provisions:

"An issue of fact arises (1) upon a plea of not guilty; or (2) upon a plea of a former conviction or acquittal of the same crime": B. & C. Comp. § 1375.

"An issue of law arises upon a demurrer to the indictment": B. & C. Comp. § 1376.

"An issue of law must be tried by the court, and an issue of fact by a jury, of the county in which the action is triable": B. & C. Comp. § 1377.

2. It is maintained by counsel for the State, and suggested in the decision of the circuit court, that, as a person charged with a crime is permitted at his election to plead forthwith or at such further time as may be allowed by the court, if he does not so plead, judgment must be entered against him, and that, if the defendant desires to enter a plea, it becomes his imperative duty to make it manifest, citing *People v. King*, 28 Cal. 265, as sustaining that view. In that case the defendant, when called upon to plead, acting on the advice of his attorney, refused to do so, whereupon the court ordered a plea of not guilty

to be entered, and impaneled a jury before which he was tried, resulting in conviction. The statute of that state, like ours, provides that, in case a defendant refuses to plead, judgment shall be entered against him. Relying on the theory that the trial was irregular because sentenced on the verdict of a jury in place of sentence by the court without such verdict, the defendant appealed. On this question the court held that the defendant was in no way injured, as he had not only had every guarantee given him by the statute, but, more than that, he had been tried by a jury, and, while it was the duty of the court to have entered judgment without a jury in the manner specified in the statute, having had a jury trial, defendant, not being injured by reason thereof, was in no position to complain.

In holding that case to be in point here the learned court below evidently overlooked the fact that the defendant in the case cited refused to plead after being given an opportunity to do so. That the trial court and counsel for the State have misapplied the authority last considered manifestly appears from later decisions on the point in that state, among which is *People v. Corbett*, 28 Cal. 328. The defendant there was tried and convicted of grand larceny. After being informed of the indictment, he asked and was given four days in which to plead, but did not plead on the day set for that purpose. Two weeks later he was brought into court, and through his counsel moved for a separate trial, the indictment being against him and two others. The motion was granted, a jury impaneled, witnesses sworn on behalf of defendant, and the case argued to the jury, which, after receiving their charge, returned a verdict of guilty. The court there states that there was manifestly no arraignment, that the indictment was not read to the defendant, nor a copy tendered to him, nor defendant asked whether he would plead guilty or not guilty to the indictment, and holds: "If the defendant had at any time anterior to the trial pleaded not guilty, the defects in the arraignment, or rather the omission to arraign, might have been cured, on

the ground of waiver. But neither the motion of defendant for a separate trial, nor the introduction of witnesses by him, nor the fact that the case was argued on his behalf to the jury—nor did all of them combined—cure the want of a plea. There was not only no arraignment, but over and beyond that there was no issue for the jury to try. Not only did the defendant not plead; but, inasmuch as the statute opportunity for pleading was never extended to him, he was never under any obligation to plead. A verdict in a criminal case where there has been neither arraignment nor plea is a nullity, and no valid judgment can be rendered thereon: *Douglass v. State*, 3 Wis. 820; 1 Wharton, § 530. And so is a verdict rendered upon a plea put in by the attorney of a party indicted for a felonious assault with intent to rob: *McQuillen v. State*, 8 S. & M. 587." Section 296 of the California Code (St. 1851, p. 244, c. 29) quoted in *People v. King*, 28 Cal. 265, which is identical with Section 1364, B. & C. Comp., quoted above, is mentioned in *People v. Corbett*, 28 Cal. 328, concerning which the court say: "The act does not extend to the case of a verdict where there is a plea but no indictment, nor does it reach the case of a verdict where there is an indictment but no plea. Where either of the two are wanting, it is as fatal as though both were wanting. The presence of both is essential to an issue, and, where there is no issue, an oath administered to the jury would impose no obligation, nor would false swearing on the part of witnesses amount to perjury. That a trial so conducted 'would tend to prejudice the defendant in respect to a substantial right' * * is too plain for argument."

3. It is also maintained that defendant could not have been injured by not entering a plea as to his guilt or innocence. The same could in some instances be said of a person tried for a felony and convicted without a jury, or where, being represented by counsel, he is tried and convicted in the usual manner, but without being present in person. In *State v. Cartwright*, 10 Or. 193, it is held, and is the universal rule, that the presence of the defendant, when tried for a felony, cannot

be waived, and is essential to a valid conviction. As stated in *Hopt v. Utah*, 110 U. S. 574, 579 (4 Sup. Ct. 202, 204: 28 L. Ed. 262): "The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods." The law does not even permit the attorney of a person charged with a felony to enter a plea for him, but requires the defendant to do so in person. Even on the day set for that purpose it is not customary, nor is it expected, that the defendant shall arise and make such plea known until directed by either the court or district attorney. He would have no means of knowing when the particular time of the day or hour fixed had arrived until his attention should be called to it in the usual manner. The prisoner, as a rule, would be the last to risk incurring the court's displeasure by rising unsolicited at an improper moment to announce he was ready to plead. It is not, therefore, to be expected that the defendant should make his desire in that respect manifest until called upon to do so. The attorney might think a plea of guilty inadvisable, and yet the defendant himself, for reasons unknown to his counsel, may desire to enter such plea. His rights in this respect are such that his attorney can neither exercise nor waive for him.

The case at bar furnishes a good illustration of an instance where the public has an interest in the proper trial of the person charged with a crime. Here we have a defendant, who, when on trial, was but 17 years of age, and sentenced to 20 years' imprisonment in this case, and 5 years' additional in another case here pending. He was tried under constitutions guaranteeing that no man shall be convicted or deprived of his liberty without due process of law, and that "laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice": Const. Or. Art. I,

§ 15. Yet it is contended that he should remain imprisoned for a quarter of a century without having been convicted in the manner prescribed by our statute. If innocent, the public may need and is entitled to his services as a citizen, even though he should desire to waive all his legal rights and seek imprisonment. If guilty, not only the defendant, but the public, as stated, is entitled to any reduction of sentence or other benefits that may have been possible by the defendant showing a desire to be reformed, and throwing himself on the mercy of the court with the chance, however small it may have been, of being permitted to serve a shorter term as a convict and a longer period of his life as a reformed member of society. In the first act proposed in this country for proportioning crimes and punishments, prior to which (1778) even many small offenses were capital, it was stated that "the reformation of offenders was an object worthy of the attention of the law, and that extermination instead of reforming the accused weakened the state by cutting off so many who, if reformed, might be restored sound members to society, who, even under a course of correction, might be rendered useful in various labors for the public. * *": Jefferson's Works (ed. 1903), Vol. I, p. 218.

4. In *Elick v. Washington Territory*, 1 Wash. T. 138, an Indian was tried and convicted of murder after the entry by his counsel of a plea of "not guilty." On appeal his failure to plead in person was assigned as error; and, in passing on this point, the court make the following observation: "Articles V and VI, Amendments to the Constitution of the United States, among other rights secured to the accused, declare 'the accused shall enjoy the right to be informed of the nature and cause of the accusation' against him; and, however the law may be in inferior crimes, in capital cases, when the prisoner is put upon his trial, this right cannot be waived by the counsel nor denied by the court. Nor is it an answer to this to say that a waiver of arraignment by counsel and entering a plea of not guilty by counsel secure to the prisoner all the benefits of an arraignment in person or a plea of not guilty entered by pris-

oner in person, and that thereafter prisoner should not be permitted to except to what was not to his disadvantage on the trial. The prisoner, if guilty, might consider it to his interest to plead guilty and put himself upon the mercy of the jury or court. But, whether so or not, before any man 'shall be held to answer for a capital or otherwise infamous crime,' it is absolutely indispensable that the nature of the accusation as contained in the indictment should be made known to him, that he may enjoy the privilege of assenting or dissenting, by plea of guilty or not guilty, to the charge alleged." *State v. Straub*, 16 Wash. 111 (47 Pac. 227), is cited as holding to the contrary rule, but that case is not in point, and the statements there on the question here involved are mere dicta, for the reason that the defendant in that instance did, in fact, enter a plea, and the same was shown by a *nunc pro tunc* entry of an order curing the defect.

Numerous cases are cited in the opinion of the learned court below and by the State as sustaining respondent's contention, but, after a careful examination thereof, we find that, owing to the facts surrounding the various cases upon which the decisions there hinge, few are applicable to the case before us. Of the cases cited the following appear to sustain the position that the entry of a plea is not essential under all circumstances, even when the charge is for a felony: *Moore v. State*, 51 Ark. 130 (10 S. W. 22); *State v. Cassady*, 12 Kan. 550; *People v. Bradner*, 107 N. Y. 1 (13 N. E. 87); *Tarver v. State*, 95 Ga. 222 (21 S. E. 381); *State v. Winstrand*, 37 Iowa, 110. The case of *State v. Jerry*, 3 La. Ann. 576, decided in 1848, is probably the first on record, and *State v. Cassady*, 12 Kan. 550 (1874), impliedly overruled by subsequent decisions of that court, the second to hold this view. The decision in *State v. Jerry*, however, is not in harmony with the subsequent decisions of that state. The case of *State v. Chenier*, 32 La. Ann. 103, makes no reference to the State-Jerry Case, but, notwithstanding the plea was entered after the beginning and before the close of the trial, the judgment of the trial court was reversed;

the appellate court stating: "We cannot sanction such a departure from ancient landmarks in criminal procedure. The prisoner must be arraigned, and must plead to the indictment before the case is set down for trial or tried. It may be that in this particular case no prejudice was wrought to the accused. Still we think it unsafe to sanction such irregularities in capital cases." See, also, *State v. Hunter*, 43 La. Ann. 157 (8 South. 624); *State v. Brackin*, 113 La. 879 (37 South. 863).

It will be observed that the courts holding to the rule invoked by the plaintiff do so on the assumption that the entry of a plea is a matter of form and not of substance, while those holding to the doctrine here recognized declare the plea essential to an issue, without which there can be nothing to try. The authorities supporting the position urged by the State, with but one exception (*Martin v. Territory*, 14 Okl. 593: 78 Pac. 88), were filed prior to the decision in *Crain v. United States*, 162 U. S. 625 (16 Sup. Ct. 952: 40 L. Ed. 1097), in which, although the omission of the plea was there raised for the first time, the court fully sustain the rule here insisted upon by defendant. The statute under which the defendant in that case was tried is, on all material points, similar to the Criminal Code of this State, including, also, provisions to the same purpose as Sections 1404 and 1484, B. & C. Comp., to the effect that any technical errors and imperfections or departure from the form or mode prescribed by the Code shall be disregarded unless it actually prejudiced or tends to the prejudice of the defendant. Mr. Justice HARLAN, speaking for the court, so clearly states the law on the subject, and gives such cogent reasons for the doctrine announced, that we quote extensively therefrom as follows: "The views we have expressed would seem to be the necessary result of Section 1032 of the Revised Statutes,* which provides: 'When any person indicted for an offense against the United States, whether capital or otherwise, upon his arraignment stands mute or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf in the same manner as if he had

pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury.' This statute is based on Act April 30, 1790, c. 9, § 30, 1 Stat. 119; Act March 3, 1825, c. 65, § 14, 4 Stat. 118; and Act March 3, 1835, c. 40, § 4, 4 Stat. 777. It proceeds upon the established principle that before a criminal trial can be legally commenced there must be an issue to try, and that a plea by or for the accused is essential to the formation of the issue. And the section above quoted requires the entry of the plea before the trial commences. Where the crime charged is infamous in its nature, are we at liberty to guess that a plea was made by or for the accused, and then guess again as to what was the nature of that plea? Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty. Nor ought the courts, in their abhorrence of crime, nor because of their anxiety to enforce the law against criminals, countenance the careless manner in which the records of cases involving the life or liberty of an accused are often prepared.

Before a court of last resort affirms a judgment of conviction of, at least, an infamous crime, it should appear affirmatively from the record that every step necessary to the validity of the sentence has been taken. That cannot be predicated of the record now before us. We may have a belief that the accused, in the present case, did, in fact, plead not guilty of the charges against him in the indictment. But this belief is not founded upon any clear, distinct affirmative statement of record, but upon inference merely. That will not suffice. We are of opinion that the rule requiring the record of a trial for an infamous crime to show affirmatively that it was demanded of the accused to plead to the indictment, or that he did so

plead, is not a matter of form only, but of substance in the administration of the criminal law. Consequently such a defect in the record of a criminal trial is not cured by Section 1025 of the Revised Statutes,* but involves the substantial rights of the accused. It is true that the constitution does not, in terms, declare that a person accused of crime cannot be tried until it be demanded of him that he plead, or unless he pleads, to the indictment. But it does forbid the deprivation of liberty without due process of law, and due process of law requires that the accused plead, or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can rightfully proceed, and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law, and essential to a valid trial, was taken in the trial court. Otherwise the judgment will be erroneous. The suggestion that the trial court would not have stated, in its order, that the jury was sworn to try and tried 'the issue joined,' unless the defendant pleaded, or was ordered to plead, to the indictment, cannot be made the basis of judicial action without endangering the just and orderly administration of the criminal law. The present defendant may be guilty, and may deserve the full punishment imposed upon him by the sentence of the trial court. But it were better that he should escape altogether than that the court should sustain a judgment of conviction of an infamous crime where the record does not clearly show that there was a valid trial." A dissenting opinion appears by Mr. Justice PECKHAM, who not only holds it should be presumed a plea was entered without that fact affirmatively appearing in the record, but, like all the courts sustaining that view, appears to entirely overlook the fact that the statute expressly makes a plea essential to an issue, and that without such a plea it would necessarily result in the conviction of the person charged with a crime without an issue having been tried, and also fails to take into consideration the further important feature that the public is interested in seeing that a person is not deprived of either life or liberty without a trial in the manner prescribed by law.

The authorities sustaining the principles enunciated in *Crain v. United States*, and here recognized, are numerous, among which are 4 Bl. Comm. pp. 322, 323, 341; 1 Bishop, New Cr. Proc. §§ 733, 801; Wharton, Am. Crim. Law, § 530; *Crain v. United States*, 162 U. S. 625 (16 Sup. Ct. 952: 40 L. Ed. 1097); *Hopt. v. United States*, 110 U. S. 579 (4 Sup. Co. 202: 28 L. Ed. 262); *Shelp v. United States*, 81 Fed. 694 (26 C. C. A. 570); *Childs v. State*, 97 Ala. 49 (12 South. 441); *Territory v. Blevins*, 4 Ariz. 68 (77 Pac. 616); *People v. Corbett*, 28 Cal. 328; *People v. Monaghan*, 102 Cal. 229 (36 Pac. 511); *Ray v. People*, 6 Colo. 231; *Hoskins v. People*, 84 Ill. 87 (25 Am. Rep. 433); *Parkinson v. People*, 135 Ill. 401 (25 N. E. 764: 10 L. R. A. 91); *Dansby v. United States*, 2 Ind. T. 456 (51 S. W. 1083); *Hicks v. State*, 111 Ind. 402 (12 N. E. 522); *State v. Baker*, 57 Kan. 541 (46 Pac. 947); *State v. Chenier*, 32 La. Ann. 103; *State v. Hunter*, 43 La. Ann. 157 (8 South. 624); *State v. Brackin*, 113 La. 879 (37 South. 863); *Commonwealth v. Hardy*, 2 Mass. 303; *Sartorious v. State*, 24 Miss. 602; *Hill v. People*, 16 Mich. 351; *Grigg v. People*, 31 Mich. 471; *State v. Vanhook*, 88 Mo. 105; *State v. Saunders*, 53 Mo. 234; *Beck v. United States*, 145 Fed. 625 (76 C. C. A. 417); *Barker v. State*, 54 Neb. 53 (74 N. W. 427); *Browning v. State*, 54 Neb. 203 (74 N. W. 631); *Hill v. State*, 1 Yerg. 76 (24 Am. Dec. 441); *Jefferson v. State*, 24 Tex. App. 535 (7 S. W. 244); *Douglass v. State*, 3 Wis. 820; *People v. Heller*, 2 Utah, 133; *Davis v. State*, 38 Wis. 487; *Elick v. Territory*, 1 Wash. T. 136.

It is true that the statute making a plea essential to an issue is merely declaratory of the common law, but the fact that it does so merely supplements the reason for holding to the well established landmarks in this particular, for it is evident from the embodiment of this provision in our code that this requirement is deemed by the lawmaking bodies of the country a wise one, and, if wrong, the power to effect the change is, and should remain, a legislative and not a judicial function. The statute, by its terms, has expressly declared the entry of a plea to be

essential to an issue, and its language in this respect being clear and free from doubt, we must recognize its provisions so long as in force.

The judgment of the court below should be reversed, and a new trial ordered.

REVERSED.

Argued 9 July, decided 27 August, 1907.

BRATTAIN v. CONN.

91 Pac. 454.

WATER COURSES—OBSTRUCTION OF FLOW—MAINTENANCE OF DAM.

Where complainants and their predecessors in interest for more than 20 years had asserted and exercised a right each year to construct and maintain, whenever necessary, a temporary dam or obstruction in the main channel of a river to divert water into a creek for irrigation purposes, without any intimation from defendants or their predecessors in interest that complainants' right to maintain the dam was questioned, complainants acquired a prescriptive right to maintain it, notwithstanding defendants clandestinely and without complainants' knowledge at various times forcibly destroyed the works so maintained.

From Lake: HENRY L. BENSON, Judge.

Suit by T. J. Brattain and others against George Conn and another, in which plaintiffs prevailed, whereupon defendants appealed.

AFFIRMED.

For appellants there was a brief over the names of *Charles Amos Cogswell* and *Edwin Mays*, with an oral argument by *Mr. Cogswell*.

For respondents there was a brief over the names of *Dolph, Mallory, Simon & Gearin, Lionel Richard Webster* and *E. M. Brattain*, with oral arguments by *Mr. Joseph Simon* and *Mr. Webster*.

PER CURIAM: This suit is brought by T. J. Brattain and nine other landowners in the Chewaucan Valley, for themselves and others similarly situated, to establish the right to maintain a temporary dam or obstruction in the Chewaucan River, at the head of Small Creek, during low-water seasons, for the purpose of diverting a portion of the water of such river into Small Creek for irrigation purposes, and to enjoin defendants from interfering with such right. The Chewaucan River is

quite a large stream flowing northeasterly through the Town of Paisley. Just above the town it divides, and one fork thereof, called "Small Creek," flows in a southeasterly direction, and from which plaintiffs irrigate about 2,000 acres of land. Prior to 1880, and while the 40-acre tract at the head of Small Creek, and through which the main river flows, belonged to the State, plaintiffs or their predecessors in interest entered upon and improved Small Creek, for the purpose of conducting water through it for irrigating purposes; and, as the natural flow was not sufficient for their needs during the low-water seasons, they constructed and maintained, each year during that time, a temporary dam in the main river for the purpose of diverting a portion of the water into Small Creek, thus augmenting the natural flow thereof. While they were so using Small Creek and maintaining their dam, the land was conveyed by the State to one Riggs, who subsequently sold it to Hanchett, who conveyed it to Drinkwater in August, 1882. From the time of the conveyance by the State to Riggs, in 1880, and up to 1886, plaintiffs used Small Creek as a part of their irrigation system, and maintained the dam referred to without objection from the landowner, so far as the evidence discloses; but in 1886, some question arising between them and Drinkwater, Brattain and others purchased the right to use the natural channel of Small Creek from him as a conduit through which to convey water from the main channel of the river, through and across his lands, with the right to enter thereon for the purpose of enlarging or clearing the stream from obstructions and placing and maintaining headgates therein and such other work or works as may be found necessary to maintain and control the desired flow of water. A few days after making this conveyance to Brattain and his associates, Drinkwater conveyed the premises to Virgil Conn, who in October, 1889, sold and conveyed to defendant George Conn, who has ever since been the owner thereof. After the Drinkwater deed, plaintiffs or their predecessors in interest continued to use Small Creek and to maintain the dam in the main stream as before, without any

expressed objections or protest from defendants or their predecessors in interest, until 1902, when defendants tore out the dam and by force prevented plaintiffs from rebuilding it, whereupon this suit was commenced. It resulted in a decree in favor of plaintiffs, and defendants appeal.

The only question involved is the right of plaintiffs to construct and maintain a temporary dam or obstruction in the Chewaucan River at the head of Small Creek to increase the flow to 2,500 inches of water in such creek during the low-water seasons. They claim this right by virtue of a grant from Drinkwater and by prescription. The deed from Drinkwater to Brattain and his associates conveyed the use of Small Creek as a conduit for water from the main channel, with the right to place and maintain a headgate therein, and "such other work or works as may be necessary to maintain and control the desired flow of water through said creek channel"; and it can be fairly argued, in view of the circumstances, this language was intended to and did include the right to construct a dam in the main river, as the grantees had theretofore done. But, however that may be, we think a prescriptive right to maintain such dam is shown by the testimony. It clearly appears that for more than 20 years the plaintiffs and their predecessors in interest have asserted and exercised the right each year to construct and maintain, whenever necessary, a temporary dam or obstruction in the main channel of the river to divert from 2,000 to 2,500 inches of water into Small Creek for irrigation purposes, and without any intimation from defendants or their predecessors in interest that their right was questioned. It is true that defendant George Conn testifies that he often tore out and removed the dam, but there is no evidence that plaintiffs knew of this fact, or that it was done at a time when they needed the water. It was a clandestine and secret invasion of their rights, and we do not understand that an entry by stealth and without the knowledge of the party in possession is sufficient to break the continuity necessary to constitute an adverse possession or to establish a right by prescription.

It is unnecessary for us to further review the testimony. It is sufficient that we have examined the record with care and find no reason why the decree of the court below should be disturbed. The decree will be affirmed. **AFFIRMED.**

Argued 31 July, decided 3 September, 1907.

HILDEBRAND v. UNITED ARTISANS.

91 Pac. 542.

LIFE INSURANCE—BURDEN OF PROOF AS TO SUICIDE.

1. The burden of proving suicide as a defense to a claim on a life insurance policy is on defendant under the rule that he who alleges must prove.

INSURANCE—LOCAL OFFICERS AS AGENTS OF INSURER.

2. Where the by-laws of a mutual benefit society provide that on a member's death the officers of the local society to which he belongs shall furnish full proof of death on printed blanks prepared for that purpose and give their opinion of the validity of the beneficiary's claim, such local officers must be considered the agents of the general society.

EVIDENCE—ADMISSIONS OF AGENT.

3. Where local officers of a mutual benefit society are required to furnish proofs of death on the decease of a member of such local society, the statements and admissions of such officers, made against the interests of the general society, are competent evidence against it in an action on the benefit certificate.

INSURANCE—PROOFS OF DEATH—QUESTION FOR JURY.

4. In an action on a mutual benefit certificate, evidence held to require submission to the jury of the question whether proof of death was submitted by plaintiff or was furnished by the secretary of the local order in accordance with its by-laws.

WITNESSES—OFFERING EXHIBITS ON CROSS EXAMINATION.

5. Where a witness has referred to documents on direct examination, the opposite party has a right to have such documents identified and marked as a part of the cross examination, but it is very doubtful whether they can then be offered in evidence.

HARMLESS ERROR—EVIDENCE SUBSEQUENTLY RECEIVED.

6. Error, if any, in rejecting evidence is rendered harmless and unavailable on appeal by subsequently receiving such evidence and submitting it to the jury.

INSURANCE—BENEFIT CERTIFICATE—ACTION—EVIDENCE.

7. Where the local secretary of a mutual benefit society, in accordance with its by-laws, sent proofs of insured's death to the supreme secretary, it was immaterial that she procured the services of an attorney, who was a member of the order, and who subsequently became the attorney for the beneficiary in an action on the certificate, to assist her in preparing such proofs.

WITNESSES—COMPETENCY—KNOWLEDGE.

8. Where the local secretary of a mutual benefit society, in making out proofs of death of a member, procured the assistance of an attorney, who was also a member of the order, and who subsequently became the attorney of the

beneficiary in an action on the benefit certificate, the secretary was competent to testify whether she procured such attorney's aid as a brother member of the order or as an attorney.

EVIDENCE—RELEVANCY OF TESTIMONY.

9. In an action involving the cause of death of a person who was found shot, a hypothetical question asked of medical men as to when *rigor mortis* would set in where a person shot through the temple died almost immediately, is competent, relevant and material.

TRIAL—OBJECTIONS TO EVIDENCE—EFFECT.

10. An objection to the relevancy, competency and materiality of the subject-matter of a question waives any defects in its form.

EVIDENCE—COMPETENCY OF EXPERT.

11. A physician testifying as an expert must first be shown to be qualified either by actual experience in similar cases to the one put to him or by such careful and deliberate study as enables him to form a definite opinion of his own with reference to the matter under consideration.

TRIAL—SCOPE OF OBJECTIONS TO EVIDENCE.

12. An objection to testimony on specified grounds waives all other grounds of objection not included within those named.

An objection to a question asked of an expert on the ground that he was qualified to testify does not include an objection that the proper hypothesis had not been given.

From Douglas: LAWRENCE T. HARRIS, Judge.

Statement by MR. COMMISSIONER KING.

This is an action by Robert Hildebrand by his guardian, S. L. Culver, against the United Artisans to recover \$1,900, with interest, upon a certificate issued to W. C. Hildebrand, the father of plaintiff, as a member of the order, by which it was agreed to pay the amount demanded in event of his death. Plaintiff's father was found dead in his room in Reno, Nev., November 18, 1903, with a pistol clasped in his right hand, a bullet having entered his right temple. No one was present nor knew of the incident until some hours after its occurrence. The cause of the death is unknown, and can only be surmised from the surrounding circumstances. A coroner's inquest was had, the jury reporting to the effect that the deceased came to his death as a result of a gunshot wound inflicted by his own hand. No question was raised by the pleadings or proof as to his good standing in the order at the time of his death nor as to the identity of the beneficiary. Two questions were raised by the pleadings, namely: (1) Has the beneficiary submitted such proof of death as will entitle him to recover? (2) Did

the deceased commit suicide? The rules of the order relative to proof of death of a member of the order appear in full in *Patterson v. United Artisans*, 43 Or. 334 (72 Pac. 1095). A trial of the issues mentioned was had before a jury, resulting in a verdict for plaintiff for the sum demanded. From the judgment thereon defendant appeals. AFFIRMED.

For appellant there was a brief over the name of *Coshow & Rice*, with an oral argument by *Mr. Oliver Perry Coshow*.

For respondent there was a brief over the names of *John Thomas Long, Geo. M. Brown* and *Andrew Murray Crawford*, with oral arguments by *Mr. Long* and *Mr. Crawford*.

Opinion by MR. COMMISSIONER KING.

The first error assigned and relied upon is based upon the action of the court in sustaining an objection to defendant's offer to introduce in evidence, and have marked as its exhibit, the proof of death, as a part of the cross-examination of plaintiff's witness C. L. McKenna. This witness testified on direct examination that on April 12th, and at all times since, including the date of trial, he was and is the supreme secretary of defendant, and identified a letter to John T. Long, dated April 16, 1904, written by him as secretary of the Supreme Assembly of United Artisans. The letter was received in evidence, without objection, the material portion of which reads:

"Your letter of April 14th is at hand, and in reply will say we have received the proof papers in the case of W. C. Hildebrand, Jr., deceased on January 5, 1904."

On cross-examination the witness was questioned as to the proof papers there referred to, in the identification of which he answered that he had reference to the proof of death of Mr. Hildebrand, stating he thought it was sent by plaintiff. Witness was then handed a document and asked to state its nature, to which he replied that it was the proof mentioned in the letter, and the only proof received, which instrument was then offered in evidence. Objection was made and sustained to its introduction as incompetent and not proper cross-examination.

as well as for the special reason that a part of the instrument offered purported to be the proceedings of the coroner's inquest, by which plaintiff was not bound. Defendant's counsel insist that, since the "proof papers" were mentioned in the letter, he was entitled not only to question the witness thereon, but to introduce them in evidence, notwithstanding the proof tendered included the proceedings had at the coroner's inquest. The record discloses that the witness was interrogated on cross-examination as to the matters referred to in the letter, and that no objection was made until the "proof papers" were offered in evidence.

1. The purpose of the cross-examination, as well as the attempted introduction of the "proof" in evidence, appears to have been intended for the purpose of sustaining the claim of suicide affirmatively pleaded by the defense. Where this defense is interposed to a policy of insurance, the presumption being that death resulted from natural causes, the onus is upon the defendant to sustain the allegations to that effect: *Cox v. Royal Tribe*, 42 Or. 365 (71 Pac. 73: 60 L. R. A. 620: 95 Am. St. Rep. 752).

2. Where the by-laws of a mutual benefit society provide that upon the death of a member the officers of the local society to which he belonged, as in this case, should furnish full proof of death upon printed blanks prepared for that purpose, and give their opinion as to the validity of the beneficiary's claim, such local officers must be considered the agents of the general society: *Patterson v. United Artisans*, 43 Or. 333 (72 Pac. 1095); *Whigham v. Independent Foresters*, 44 Or. 543 (75 Pac. 1067).

3. In such cases their statements and admissions made against the interests of the general organization are competent evidence in an action on the benefit certificate: *Patterson v. United Artisans*, 43 Or. 333 (72 Pac. 1095).

4. The proof in this instance was sent the defendant by Mrs. Edith Plank, as the local secretary of the order; at least she so testified, and her statements to that effect are not contradicted by any positive testimony, and if they had been contra-

dicted it would have been a question for the jury. Evidence was given tending to show that when the proof was made J. T. Long, although assisting the local secretary, was not acting as attorney for the claimant, but as any other member of the order might have done in the way of assisting the secretary in the preparation of the proof she was required under the rules to furnish, notwithstanding he afterwards became one of plaintiff's counsel in this action, and signed his name as such. It is only upon the assumption that plaintiff, in place of the local secretary, by reason of Long's assistance, furnished the proof, that the proceedings of the coroner's inquest could be deemed admissible. There being some evidence showing that he was not acting as such attorney, and that the proof was furnished by Mrs. Plank, as secretary of the local order, it then became a question for the jury to determine whether the proof was furnished by plaintiff or by defendant's local agent.

5. The proof offered on this point by defendant was evidently intended in support of its claim of suicide, as alleged, and only admissible for that purpose. The question asked McKenna by plaintiff's counsel was for the purpose of identifying the letter offered and received in evidence; but, since he was also questioned in his direct examination as to what proof papers the letter referred to, the defense was entitled, as a part of its cross-examination, to have the proof papers identified by the witness and to mark them for subsequent reference, but it is very doubtful whether it was entitled, on cross-examination, to have them received in evidence. It was a part of its defense. Testimony of this class is sometimes admitted by the court in the exercise of its discretion, in which event its admission has been held not to be reversible error: *Wills v. Russell*, 100 U. S. 621 (25 L. Ed. 607). But it seems to be the well-recognized rule that, when a witness is called by one party, the opposing litigant only has a right to cross-examine upon the facts to which he testified in chief. In his direct examination McKenna did not pretend to identify nor to give the contents of the proof papers, but stated merely what

the letter had reference to in that respect. If, on cross-examination, defendant can be permitted to go to the extent, not only of identifying the instrument, but of introducing it in evidence, he would thereby procure the advantage, under the pretense of cross-examination, of making him his witness in chief, and, at the same time, of depriving plaintiff of any cross-examination of the witness on points thereby elicited. It is manifest that such practice should not be encouraged: *Stafford v. Fargo*, 35 Ill. 481.

6. Even though defendant's position on this point were tenable, any error that may have been committed in this respect was rendered harmless, as defendant's rights could not have been prejudiced thereby, in that all of the proof papers were subsequently admitted as a part of the defense, in the admission of which the court evidently assumed that it was a matter for the jury to determine whether the proof was furnished by the plaintiff or by defendant's local agent, and, if found as a fact to have been furnished by plaintiff, were entitled to consider the proof, with inquest attached, as an admission against plaintiff's interest, tending to support defendant's contention, and instructed the jury accordingly. We think, therefore, that defendant cannot avail itself of the alleged error of the court in refusing on cross-examination to admit the "proof papers" in evidence: *Olive v. Olive*, 95 N. C. 485; *City of Chicago v. Peck*, 196 Ill. 260 (63 N. E. 711); *Seymore v. Malcolm McD. L. Co.* 58 Fed. 957 (7 C. C. A. 593); *Wills v. Russell*, 100 U. S. 621 (25 L. Ed. 607).

7. It is next urged that the court should have sustained the objection to the question asked Mrs. Plank, "Was he [Long] assisting you as attorney or just as a member of the order at your request?" as to the status of which it is urged that the witness was not competent to express an opinion. No objection was made to the question on the ground that it was calling for the opinion of the witness; but, regardless of that feature, we fail to see what bearing the answer could have in the light of Mrs. Plank's testimony, as it is shown that she, as secretary of

the order, sent the proof to the supreme secretary. It cannot be material, therefore, what assistance she may have procured, whether legal services or otherwise, as she was acting as defendant's agent, and the papers offered in evidence, constituting the proof referred to, were received by the supreme secretary from her as such agent.

8. Again, the witness, while acting as such secretary, and having procured Long's assistance in filling out the blanks and in taking acknowledgments as a notary, was in position to know the capacity in which she procured his aid, whether as a brother member of the order or as an attorney, and fully competent to testify in reference thereto. Nor can there be any question as to her right to state the position in which Long assumed to act when he tendered and furnished his assistance: *Raub v. Otterback*, 89 Va. 645 (16 S. E. 933); *Bender v. McDowell*, 46 La. Ann. 393 (15 South. 21).

9. It is next insisted that the court erred in permitting the three physicians called as witnesses to give certain expert testimony relative to the effect of the gunshot wound in the temple of the deceased, a sample of the questions asked being:

"Q. Now you may state, doctor, from your experience as a physician, and from observing people who were wounded in that way, what in your opinion would be the effect upon the muscles as to their relaxing, or becoming immediately stiffened—I think your medical term is *rigor mortis*, setting in—if a person dies almost immediately from the effects of a pistol ball entering the head through the right temple?"

Objections were made to this class of questions as being incompetent, irrelevant and immaterial, and for the reason that the physicians testifying had not been shown qualified to answer; but no objection was predicated upon the grounds that the proper foundation had not been laid, nor proper hypothesis given therefor. There can be no doubt as to the materiality, relevancy and competency of the inquiries, as the answers sought and elicited thereby tend to rebut the proof of suicide offered by the defense.

10. An objection to the relevancy, competency and material-

ity of the subject-matter of the question waives any defects in its form: Enc. Ev. vol. 9, pp. 100-106.

11. It is a well-settled rule that before a witness can be permitted to give expert testimony it must not be on a subject of common experience: *State v. Anderson*, 10 Or. 448. The proper mode of examination is by a hypothetically stated case which should embody substantially all the facts relating to the subject; and a physician testifying as such expert must first be shown qualified to do so either by actual experience in cases similar to the one put to him or by such careful and deliberate study as enables him to form a definite opinion of his own in reference to the matter under consideration. Also, where he is called upon to testify from his own knowledge, it must appear that he has trustworthy information and knowledge of facts involved and upon which his opinion is to be founded: *Thompson*, Trials, § 588; 8 Ency. Pl. & Pr. 745; *State v. Anderson*, 10 Or. 448; *State v. Simonis*, 39 Or. 111 (65 Pac. 595); *Soquest v. State*, 72 Wis. 659 (40 N. W. 391). Each of the physicians called as witnesses in this case not only testified that he is a licensed physician and practitioner of long standing, but to facts sufficient to indicate a reasonable amount of experience in and observation of the particular kind of gunshot wounds concerning which he was examined, from which it follows that the objection made as to the qualification of the witness to give testimony elicited is untenable.

12. It is extremely doubtful, however, as to whether the questions in the form asked laid sufficient foundation or stated a proper hypothesis, but no objections appear on that account. The objections made go only to the relevancy, competency and materiality of the testimony sought by the questions and to the qualification of the witnesses to testify on the points upon which they were interrogated. It is well settled that, where an objection upon one ground does not go to the other not stated, it is a waiver of all objections not specified: Enc. Ev. vol. 9, pp. 100-106. From which it follows that an objection having as its basis the assertion that the witness has not shown

himself qualified to testify on a subject waives any objection to the sufficiency of the form of the question, or as to the proper hypothesis not being given. One goes to the knowledge of the witness, and the other to the form of the question asked. An objection to a hypothetical question on specified grounds raises no question as to its competency or sufficiency on other subjects, from which it follows that the converse must be true: Enc. Ev. vol 9, pp. 105, 106; *Stillman v. Northern Pac. F. & B. H. R. Co.* 34 Minn. 420 (26 N. W. 399). "The rule is that, where an objection is made on an untenable ground, or on a ground that works no prejudice, and is overruled, such ruling furnishes no cause for reversing the judgment, because the admission of evidence against objection on some other ground would have constituted harmful error": *McDermott v. Jackson*, 97 Wis. 70 (72 N. W. 375). Among authorities sustaining the principles here recognized are: Enc. Pl. & Pr. vol. 8, pp. 223-237; *Ladd v. Sears*, 9 Or. 244; *United Oil Co. v. Roseberry*, 30 Colo. 177 (69 Pac. 588); *White v. Smith*, 54 Iowa, 233 (6 N. W. 284); *In re New York El. R. Co.* 58 Hun, 610 (12 N. Y. Supp. 857); *Mount v. Brooklyn*, 72 App. Div. 440 (76 N. Y. Supp. 533); *Burlington Ins. Co. v. Miller*, 60 Fed. 254 (8 C. C. A. 612); *Missouri Pac. Ry. Co. v. Hall*, 66 Fed. 868 (14 C. C. A. 153); *Publishing Assoc. v. Fisher*, 95 Mich. 274 (54 N. W. 759); *McCooley v. Forty-Second St. R. Co.* 79 Hun, 255 (29 N. Y. Supp. 368); *Frankel v. Wolf*, 7 Misc. Rep. 190 (27 N. Y. Supp. 328); *People v. Frank*, 28 Cal. 508.

In *McCooley v. Forty-Second St. R. Co.* 79 Hun, 255 (29 N. Y. Supp. 368), a physician was called to testify as an expert, whose testimony was objected to, and the overruling of the objection was assigned as error. The court in passing on this point say: "The next objection relates to a hypothetical question asked of a doctor, and which is sought to be sustained by the line of cases which hold that the question must contain the facts assumed, so that the jury can have before them the facts in the expert's mind upon which he bases his answer to the

hypothetical question. These cases are not available to the appellant, because his objection was not put upon the ground that the question did not contain all the facts necessary to enable the expert to answer, but upon the ground of its incompetency." The court there held that such questions were objected to, not as to form, but as to being incompetent, and the objection thus made was not sufficient to call the attention of a trial judge to the grounds relied upon, for which reason there was no error. In *State v. Martin*, 47 Or. 282 (8 Am. & Eng. Ann. Cas. 769: 83 Pac. 849), a physician called as a witness testified that he was a graduate of a medical school and a licensed physician, and detailed the condition in which he found the injured person concerning whom he was interrogated, whereupon he was asked his opinion as to the effect of the injury, etc., which was objected to on the ground that it was incompetent, but overruled, and the witness answered; it being maintained that, as no testimony had been given tending to show the qualification of the physician testifying, either by experience or study, an error was committed in permitting him to answer. It is there held that the objection to the question as being incompetent was not sufficient to raise the question as to the qualification of the witness. For the same reason we think an objection to a question asked an expert witness on the ground that he is not qualified to testify would not include an objection on the ground that the proper hypothesis had not been given. In discussing the effect as to the objection relied on in *State v. Martin*, Mr. Justice MOORE says: "The object of every objection interposed at the trial of a cause, and of the exception to the court's ruling thereon, is to incorporate into the bill of exceptions the particular legal proposition submitted to and decided by the trial court, so that upon an appeal from its ruling an appellate tribunal may be able to review the identical question considered. As the objection which was made related to the alleged incompetency of the question, and not to the incompetency of the witness to express an opinion, the legal principle now insisted upon was evidently not considered by

the trial court, and, this being so, no error was committed in permitting Dr. Thomas to answer the question propounded after he had testified that he was a graduate of a medical school and a licensed physician, thus showing a *prima facie* qualification."

Other errors are assigned, but not argued, nor do they appear material. The record disclosing no material error, the judgment of the court below should be affirmed. **AFFIRMED.**

Decided 8 September, 1907; rehearing denied 8 January, 1908.

FARRELL v. PORT OF COLUMBIA.

91 Pac. 546, 98 Pac. 254.

STATUTES—CONSTITUTIONAL LIMITATION ON POWER OF LEGISLATURE TO CREATE MUNICIPAL CORPORATIONS.

1. The Constitution of Oregon, Art. XI, § 2, as amended in 1906, providing that corporations may be formed under general laws, and that the legislature shall not enact or repeal any charter or act incorporating any municipality, city or town, now prohibits the legislature from creating any corporation of any kind by a special act.

STATUTES—PORT OF COLUMBIA A SPECIAL PUBLIC ACT.

2. The act incorporating the Port of Columbia (Laws 1907, pp. 182, 190), is a special public act creating a corporation, and is in direct violation of Const. Or. Art. XI, § 2, as amended in 1906: *Dunn v. State University*, 9 Or. 357, and *Louggett v. Ladd*, 28 Or. 26, distinguished.

CONSTITUTIONAL LAW—AMENDMENT OF STATE CONSTITUTION—SUBMISSION TO POPULAR VOTE.

3. Const. Or. Art. IV, Section 1, as amended in 1902, reserves to the people the power to propose amendments to the Constitution and to enact or reject them at the polls, independent of the legislative assembly, and provides that, on petition filed with the Secretary of State, the amendment shall be submitted to the people, and, if approved by a majority, shall become operative. Article XVII, Section 1, provides that an amendment to the Constitution may be proposed in the legislative assembly, and if agreed to by a majority shall be referred to the legislative assembly next to be chosen, and that if the amendment shall be agreed to by a majority of that legislative assembly the amendment shall be submitted to the voters, and if a majority of them shall ratify the same such amendment shall become a part of the Constitution. *Held*, that Article XI, Section 2, as amended in June, 1906, prohibiting the legislature from creating corporations by special laws, was legally adopted, though not twice submitted to and approved by the people; Article XVII, Section 1, having no reference to an amendment made under Article IV, Section 1.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by Sylvester Farrell against the Port of Columbia and its commissioners to restrain said commissioners from proceed-

ing under the act creating said corporation. A demurrer to the complaint was sustained and plaintiff appeals.

REVERSED.

For appellant there was a brief over the name of *Dolph, Mal-lory, Simon & Gearin*, with an oral argument by *Mr. John M. Gearin*.

For Clatsop County, by permission of the court, there was a brief supporting appellant over the names of *Frank J. Taylor, J. F. Hamilton* and *George Clyde Fulton*, with oral arguments by *Mr. Taylor* and *Mr. Fulton*.

For respondents there was a brief over the names of *Warren Ellsworth Thomas, T. G. Hailey* and *Williams, Wood & Lin-thicum*, with oral arguments by *Mr. Thomas* and *Mr. Stewart Brian Linthicum*.

Opinion by MR. CHIEF JUSTICE BEAN.

This suit involves the constitutionality of an act of the legislative assembly of 1907 to establish and incorporate the Port of Columbia: Laws 1907, p. 182. By this act the counties of Multnomah, Clatsop and Columbia are created a separate district, and the inhabitants thereof are constituted and declared to be a corporation by the name and style of the "Port of Columbia," and as such to have perpetual succession; to hold, receive and dispose of real and personal property; to sue and be sued, plead and be impleaded in all suits or proceedings brought by or against it. The declared object of the corporation so formed is to promote the maritime shipping and commercial interest of the Port of Columbia. For that purpose, it is given power and made its duty to own, operate and maintain a towage service from the open sea, at the entrance of the Columbia River, to all points upon the river extending as far inland as Tongue Point, near Astoria; to purchase, own, lease, control and operate tugs and pilot boats; to appoint and license pilots; to fix and collect charge for pilotage; to acquire, own and dispose of real and personal property; to make any contracts the making of which is not in this act expressly prohib-

ited; and to do all other acts and things which may be requisite, necessary or convenient in carrying out the powers conferred. For the purpose of acquiring tug and pilot boats, and providing the same with necessary appliances, the corporation is given power to issue, sell and dispose of bonds not exceeding the aggregate sum of \$400,000, and power and authority to assess, levy and collect each year a tax upon all property, real or personal, within its boundaries, which is by law taxable for state and county purposes, not to exceed a rate therein specified, to retire such bonds at maturity and the payment of interest thereon. The power and authority given to the corporation is to be exercised by a board of commissioners, and their successors in office to be appointed as in this act provided.

1. This law was evidently modeled after that creating the Port of Portland (Laws 1891, p. 791), and, if the constitution had not been amended since the enactment of the latter statute, it could possibly be sustained, if otherwise valid, on the ground that it is a corporation created for municipal purposes. At the time of the passage of the Port of Portland act, the Constitution of Oregon (Article XI, § 2), provided that corporations might be formed under general laws, but should not be created by special laws, except for municipal purposes, and it was held *that* the Port of Portland was a corporation formed for municipal purposes within the meaning of this provision: *Cook v. Port of Portland*, 20 Or. 580 (27 Pac. 263: 13 L. R. A. 533). In June, 1906, the section referred to was amended to read:

"Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon."

By this amendment the power to create corporations for municipal purposes by special act was not only eliminated, but the creation of a corporation by such an act is expressly prohibited, and it is no longer in the power of the legislative

authority to create a corporation public or private by a special law. It would seem, therefore, that the act incorporating the Port of Columbia is in violation of this section, as amended, and void.

2. But counsel argue that it is a general and not a special law, and therefore not prohibited by the constitution. It is not easy to define the distinction between a general law and one that is special, and, to use the language of the Court of Appeals of New York: "It has been found expedient to leave the matter, to a considerable extent, open, to be determined upon the special circumstances of each case": *Ferguson v. Ross*, 126 N. Y. 459 (27 N. E. 954). Statutes are often classified as public or general and private or special, a public statute being one of which the courts will take judicial notice, while a private statute must be pleaded: 1 Kent, *460; 1 Blackstone, *85. That this is a public law must be conceded, not only because it is one of which the courts will take judicial notice, but because the constitution provides that every statute shall be a public law unless otherwise declared by the statute itself: Article IV, § 27. It does not follow, however, that because it is a public law it is a general one. "Public" and "general" as applied to statutes are sometimes synonymous, depending upon the context, but they are not so in all cases. Every general law is necessarily a public one, but every public law is not a general one. Thus, an act incorporating a city is a public law, but it is not a general one, because it is applicable to a particular locality. Also, an act authorizing a certain school district to issue bonds for the purpose of erecting a schoolhouse, and purchasing a site therefor, is a special law, and in violation of a constitutional provision that "the legislature shall pass no special act conferring corporate power": *Clegg v. School District*, 8 Neb. 179; *School District v. Insurance Co.* 103 U. S. 707 (26 L. Ed. 601). And, again, laws amending a city charter in respect to making local improvements, or extending the limits of a particular city, are special acts, and held unconstitutional under a provision that "the legislature shall pass no

special act conferring corporate power": *Atchison v. Bartholow*, 4 Kan. 124; *City of Wyandotte v. Wood*, 5 Kan. 603; *State ex rel. v. City of Cincinnati*, 20 Ohio St. 18. When used as opposite to "private," and having reference to the subject-matter of a statute, the term "general" is equivalent to "public."

When, however, it is used in reference to the territory embraced within a law, and in opposition to "local," it means operating over the whole jurisdiction of the lawmaking power, instead of a particular locality. And, when it is used in contradistinction to "special," it signifies relating to the whole community or all of a class instead of to a particular locality or a part of a class. In this latter sense a law is general when it operates equally and uniformly upon all persons, places or things brought within the relation and circumstances for which it is provided. But when it is applicable only to a particular branch or designated portion of such persons, places or things, or is limited in the object to which it applies, it is special: *Lippman v. People*, 175 Ill. 101 (51 N. E. 872); *Wheeler v. Pennsylvania*, 77 Pa. 338; 26 Am. & Eng. Enc. Law (2 ed.), 532; 1 Lewis, Sutherland, Stat. Const. § 195. It is in this sense that the terms "general" and "special" are used in the provision of the constitution now under consideration. The object of the amendment was to deprive the lawmaking power of the right to create particular corporations, either public or private, and to require that all corporations be formed under a law the provisions of which shall be applicable alike to all. A general law, within this section of the constitution, is one by which all persons or localities complying with its provisions may be entitled to exercise the powers and enjoy the rights and privileges conferred. A special law, on the other hand, is one conferring upon certain individuals or citizens of a certain locality rights and powers or liabilities not granted to, or imposed upon, others similarly situated. The act creating the Port of Portland is clearly a special law as so defined, and cannot be upheld without doing violence to the expressed and plain language of the constitution. The provision of Article

IV, § 23, prohibiting the passage of special and local laws on enumerated subjects, was under discussion in *Allen v. Hirsch*, 8 Or. 412, and *Maxwell v. Tillamook County*, 20 Or. 495 (26 Pac. 803). What is there said in reference to the distinction between general and special laws must be understood as applying to the construction of that provision of the constitution and has only a general bearing upon the present case.

The cases of *Dunn v. State University*, 9 Or. 357, and *Liggett v. Ladd*, 23 Or. 26-45 (31 Pac. 81), are cited as authorities supporting defendants' position. It is argued that the regents of the University and of the Agricultural College are not corporations for municipal purposes, and, since at the time of the passage of the laws providing for their appointment and defining their duties the legislature was inhibited from creating corporations by special law, except for such purposes, the court necessarily must have concluded in ruling that they are incorporations and that the act providing for their appointment was a general one. *Dunn v. University* (which was cited in *Liggett v. Ladd*, as authority for holding that the regents of the Agricultural College are a body capable of taking and holding title to real property) was a suit to avoid a deed made to the regents. The defense was that they were agents of and held the property in trust for the State, and therefore could not be sued. The court considered this position unsound. The effect which the provision of the constitution inhibiting the creation of corporations by special act had on the question for decision is not referred to or mentioned by the court. It is said in the opinion, however, that the University itself is not a corporation, but that the regents are an incorporated body, although not made so by the legislature. But, after discussing this question, it is finally concluded that, whether an incorporation or not, they were agents of the State, holding the legal title to the property then in controversy, and for that reason possessed no immunity from being sued, and that was the only point in the case. Its determination in favor of the plaintiff was sufficient for the purpose of the decision, and what is said about the

regents being an incorporation may, with propriety, be deemed dicta. But, however that may be, the decision is not an authority supporting the act now under consideration. The regents of the University, if an incorporation, in the sense that they may take and hold title to property, and sue and be sued, are not a corporation in the ordinary meaning of that term. They are merely administrative agents of the State, charged with the control and supervision of one of its educational institutions, with no power to levy or collect taxes, or impose burdens upon the people of the State or any particular locality thereof.

Having reached the conclusion that the act under consideration is unconstitutional and void, because it is an attempt to create a corporation by a special law, it is unnecessary to consider the question as to whether a corporation of the kind sought to be created is a municipality, within the meaning of that portion of Article XI, § 2, as amended, which prohibits the legislature from enacting, amending or repealing the charter or the act of incorporation of a municipality, city or town. The decree of the court below will be reversed and one entered here in favor of plaintiff. REVERSED.

MR. JUSTICE MOORE did not sit in this case.

Decided 8 January, 1908.

ON MOTION FOR REHEARING.

98 Pac. 254.

PER CURIAM: A petition for rehearing was filed in this case in September last. Its consideration was deferred at the request of counsel for defendants, that they might submit an additional argument in its support, and they have just advised that no such argument will be filed. Except on one point the petition is a reargument of the cause, and, notwithstanding the able presentation of counsel, we are constrained to adhere to the former opinion.

3. It is insisted, however, for the first time, that the amendment of Section 2, Article XI, of the Constitution, adopted in

June, 1906, prohibiting the legislature from creating corporations by special laws, was not legally adopted, because it was not twice submitted to and approved by the people. By Section 1, Article IV, as amended in 1902, the people reserve to themselves the power to propose amendments to the Constitution and enact or reject them at the polls, independent of the legislative assembly. This section provides that upon a petition of not more than 8 per cent of the legal voters of the State, proposing any measure, being filed with the Secretary of State not less than four months before the election at which such measure is to be voted upon, the same shall be submitted to the people, and if approved by the majority of the votes cast thereon shall become operative. There is no requirement that an amendment proposed under this section shall be submitted to and approved by the people more than once, and Section 1, Article XVII, can have no reference to such an amendment, since the power reserved to the people is "independent of the legislative assembly."

Petition for rehearing denied.

REVERSED: REHEARING DENIED.

Argued 8 October, decided 15 October, 1907.

WATERHOUSE v. CLATSOP COUNTY.

91 Pac. 1068.

TAXATION—STATUTORY PROVISION FOR COLLECTION.

The extension of the taxes on the assessment roll is part of the process of collection and is no part of the assessment, apportionment or levy.

From Clatsop: THOMAS A. McBRIDE, Judge.

Suit by John Waterhouse and George Kaboth to restrain Clatsop County and its officers from purchasing a blank assessment roll and extending thereon the assessment and taxes for the year 1907, for the reasons that there is no law authorizing such expense and that plaintiffs' taxes will be thereby greatly increased illegally. A demurrer to the complaint was overruled and a decree entered as prayed. The case was submitted on briefs under the proviso of Rule 16: 35 Or. 587, 600.

AFFIRMED.

For appellants there was a brief over the names of *Gilbert L. Hedges*, District Attorney, and *John Curran McCue*.

For respondents there was a brief over the names of *John Henry & Albert Marshall Smith*.

Opinion by MR. CHIEF JUSTICE BEAN.

The question for decision on this appeal is whether the county clerk is required to extend the taxes levied for the year 1907, on the original assessment roll, and deliver such roll, with a warrant for the collection attached, to the tax collector, or whether he shall make a transcript of the original roll, extend the taxes thereon, and deliver the same, with the tax warrant attached, to such officer. Prior to the act of February 28, 1907 (Laws 1907, p. 453), the law required the county clerk to make a certificate of the several amounts apportioned to be assessed upon the taxable property of his county and deliver the same to the sheriff, together with a transcript of the original assessment roll, with the amount of taxes extended and entered thereon, and with a warrant authorizing the collection of such tax attached: B. & C. Comp. § 3090. On February 28, 1907, an act was passed to provide a more efficient system for the levy and collection of taxes: Laws 1907, p. 453. By Section 14 of this act the county clerk is to extend the taxes on the original roll in place of on a transcript thereof, as formerly, and deliver such original roll, with the taxes so extended and warrant attached, to the tax collector; and by Section 80 it is declared that all laws heretofore in force are to continue in force and effect until all things and acts in and about the assessment, apportionment and levy of taxes upon the basis of ownership of property on the 1st day of March, 1907, and the assessment, apportionment, levy and collection of taxes and proceedings incident thereto, made or commenced prior to such date (except as specified in Section 55), have been fully and duly performed, but that the taxes levied on the basis of ownership of property on the 1st day of March, 1907, shall be collected as in the act provided.

The object of this provision is plain. The assessment for the year 1907 was to be made on the basis of ownership of property on March 1, of that year, and therefore would be partly completed before the act of February 28th could go into effect. It was consequently provided that such assessment should be made and the taxes apportioned and levied in accordance with the law in force at the time the making of the assessment was commenced. The taxes assessed and levied for the year 1906, and previous years, could not, in the nature of things, be all collected prior to the time the act of 1907 came into effect, and therefore it was provided that as to assessment, apportionment, levy and collection of such taxes the law under which the same was made should continue in force. But there was no necessity for any such provision as to the collection of taxes levied on the assessment of 1907, and hence it is provided that such taxes shall be collected in the manner provided in the act of February 28, 1907. The extension of taxes on the tax roll and the delivery of the roll, or a copy thereof, to the tax collector, with a warrant attached, is a step in the collection of the taxes, and not in the assessment, apportionment or levy. The law has always carefully distinguished between the assessment, apportionment and levy of taxes, and their collection, and the extension of the taxes upon the roll, or a copy thereof, has always been regarded as one step in the collection. Chapters 1 to 5, inclusive, of Title 30, B. & C. Comp., relates to the assessment, apportionment and levy of taxes, while chapters 6 and 7 govern their collection, and the provision for the extension of the taxes on a transcript of the roll and delivery of such transcript to the sheriff is part of chapter 6. The same distinction was recognized by the legislature of 1907. It passed two acts in reference to assessment and collection of taxes—one to provide a more efficient and equitable system for the assessment of property for taxation (Laws 1907, p. 485), and the other a more efficient system for the levy and collection of taxes, and the provision in reference to the extension of the taxes on tax roll is found in the latter act: Laws 1907, p. 453.

We conclude, therefore, that the extension of the taxes on the tax roll is no part of the assessment, apportionment or levy of the tax, but is a step in the process of its collection, and the clerk should extend the taxes for 1907 on the original assessment roll, and deliver such roll, with warrant attached, to the tax collector, as provided in act of 1907. Decree of court below will be affirmed. **AFFIRMED.**

Argued 30 July, decided 22 October, 1907.

ROACH'S ESTATE.

92 Pac. 118.

EXECUTORS—RELATION OF TO LEGATEES AND HEIRS.

1. In a general sense the relation of an executor to the legatees and others entitled to the estate is one of trusteeship.

TESTAMENTARY TRUSTS—WHAT COURTS HAVE JURISDICTION.

2. The circuit courts have jurisdiction of the subject matter of trusts created by wills which impose on executors the duties of testamentary trustees, to the exclusion entirely of probate courts.

RELATIVE RIGHTS OF EXECUTORS AND TRUSTEES.

3. Where an executor has lawfully secured possession of any property of his testator, he has the exclusive control over it until he has been discharged, and any interference therewith by another will be an intrusion on the rights of the probate court.

TERMINATION OF DUTIES AS EXECUTOR BEFORE BECOMING TRUSTEE.

4. Where an executor has been also appointed testamentary trustee, he should not assume to act in the latter capacity until he has settled his accounts as executor and been discharged.

EXECUTORS—EVIDENCE OF ASSUMING TRUSTEESHIP.

5. The evidence of a change of position from executorship to trusteeship should be some affirmative action, such as securing a release from the probate court and filing a trustee's bond. A mere ceasing to file reports as executor will not be sufficient.

JURISDICTION OF COUNTY COURT TO COMPEL REPORT BY EXECUTOR.

6. Where an executor has admitted the jurisdiction of the county court by securing from it a confirmation of his appointment as executor, and recognized its authority by making to it semi-annual reports as required by statute, the county court is empowered to compel a final settlement, nothing having been done to defeat that right.

JURISDICTION OF CIRCUIT COURTS ON APPEALS IN PROBATE MATTERS.

7. Under Sections 555 and 558, Subd. 3, B. & C. Comp., providing that on appeal from the county court the proceedings shall be tried anew in the circuit court, and that the circuit court may give a final decree in the cause, a probate proceeding appealed from the county court is to be tried anew in the circuit court on all questions presented by a transcript of the entire record, the provision of section 554, that the appellate court may modify a decree "in the respect mentioned in the notice," being applicable only to appeals from circuit courts to the supreme court.

Under Section 1100, B. & C. Comp., providing that the procedure in the county court when exercising probate jurisdiction shall be in the nature of a suit in equity, the county court is not technically a court of equity, and the rule governing appeals from parts of decrees in circuit courts do not govern appeals from final decisions of the county courts in the settlement of estates.

EXECUTORS—JURISDICTION OVER OBJECTIONS TO ACCOUNTS.

8. Under Sections 1202 and 1208, B. & C. Comp., authorizing the filing of objections to the final account of an executor, "specifying the particulars of such objections," etc., the court on hearing objections to such final account is limited to the particular specifications set forth in the objections.

FINAL ACCOUNT—ITEMS PRACTICALLY CONCEDED AS ERROR.

9. Where an executor says he has no personal recollection of paying an item credited to his account, and the payee testifies that he did not receive it, the credit is properly disallowed.

SAME—INTEREST ON REJECTED CREDIT.

10. Where the objection to the allowance of a credit in an executor's final account does not require him to account for interest on the amount thereof, and there is no declaration in the exception of any sum due as compensation for the use of money on account of the item, interest should not be granted on the amount of the credit on the same being disallowed.

SAME—UNCHALLENGED ITEMS—REJECTION.

11. Unchallenged items on the credit side of an executor's final account cannot be rejected.

EXECUTORS—DUTY IN MANAGEMENT OF ESTATE.

12. An executor investing trust funds is not an insurer, but must exercise that degree of discretion which an intelligent person of ordinary prudence would observe in the management of his own affairs.

FINAL ACCOUNT—VALUE OF TESTIMONY OF INTERESTED PARTY.

13. On the issue whether an executor exercised proper care in loaning trust funds on security of a mortgage, the borrower is competent to testify, but his opinion cannot be considered the best evidence, for he is an interested person.

EXECUTORS—SETTLEMENT OF ACCOUNTS—BURDEN OF PROOF.

14. Where an executor's final account is properly challenged, the burden of proving the truth of an item or the reasonableness of a credit objected to is on him.

SAME—INVESTMENTS—LOSS—LIABILITY.

15. An executor loaned \$2,000 of trust funds, taking as security therefor a mortgage on 160 acres of unimproved land and 80 acres of alleged timber land, remote from markets and carrying only a small number of commercial trees. At a foreclosure sale, the tracts were sold at a sum insufficient to pay the debt. The borrower testified that he considered the loan adequately secured, but no other person so stated. *Held* sufficient to show want of proper care on the part of the executor in making the investment, rendering him personally liable for the loss.

SAME—LOAN ON INSUFFICIENT SECURITY.

16. A purchaser of land for \$5,000 paid two-thirds and gave two notes secured by a mortgage on the premises. An executor purchased with trust funds both notes. The mortgage was foreclosed, and a deficiency resulted. When the executor bought the first note, no depreciation in the value of the property had occurred, but at the time he purchased the second note the value of the premises had declined. The land had only a speculative value, was unimproved, and by reason of its situation had no real worth as a basis for security. *Held*, that the executor was personally liable for the loss.

SAME—SECOND MORTGAGE SECURITY.

17. Where a loss occurs to an estate by reason of a loan on a second mortgage security, the executor is personally liable for the loss.

SAME—ITEM UNDER CONSIDERATION.

18. An executor loaned money and took a second mortgage on lots and a mortgage on a 10-acre tract. The lots satisfied only the first mortgage. The executor took no steps to foreclose the mortgage on the 10-acre tract. No testimony of its value was given. *Held*, that the executor was properly chargeable with the loss, he failing to sustain the burden of proving the adequacy of the security.

SAME—DUTY TO AVOID STATUTE OF LIMITATIONS.

19. An executor failing to foreclose a mortgage taken as security for a loan of trust funds and allowing limitations to bar a recovery is personally liable for the loss to the estate.

SAME—ITEMS NOT OBJECTED TO.

20. In settling an executor's accounts items not objected to should not be reviewed.

SAME—LIABILITY FOR LOANS MADE WITHOUT SECURITY.

21. The loss of trust funds loaned without any security or on manifestly inadequate security is negligence, and an executor is personally liable for a failure to obtain a repayment of the moneys loaned, whether the loan was made before or after the passage of an act prescribing the manner of investing funds by a trustee, because such a proceeding does not disclose the prudence ordinarily exercised by intelligent men in their affairs.

FINAL ACCOUNT—REPORT AND OBJECTIONS THERETO.

22. A decree requiring an executor in the settlement of his final account to account for sums found to be due the estate must be based on his final account, the objections thereto and the proofs.

FINAL ACCOUNT—RIGHT TO FILE AMENDED OR FURTHER OBJECTIONS.

23. Legatees objecting to the final account of an executor are not limited to their original objections, but they may file additional or amended objections, or modify their demand, to correspond with the testimony.

SAME—INVESTMENTS—LOSSES—LIABILITY.

24. An executor bought a note for \$800, secured by a mortgage, and purchased the premises at foreclosure, and, after having received rents, sold the same for \$900. The executor's counsel offered a settlement on the basis that the sale of the premises was made to the executor in his own name, so that he should be personally charged with the money expended therefor and interest thereon. The court charged the executor with the sum paid for the note, the interest thereon, the taxes paid, and expenses incurred on account of the property, and credited him with the sum received on the resale and the rent. *Held*, that the conclusion of the court should not be disturbed.

SAME—COMPENSATION—ALLOWANCE.

25. Where an executor did not apply to the county court for advice in the management of the estate, and for more than eight years made no report of his dealings, though required by B. & O. Comp. § 1199, to account semi-annually, the court properly denied him any extra compensation, office rent or attorney's fees.

SAME—OBJECTIONS NOT SPECIFIED.

26. Where the objections to the final account of an executor do not assign grounds urged on appeal, a denial of the relief sought by the objectors is not erroneous.

EXECUTORS—ACCOUNTING—TERMS OF DECREE.

27. Where an executor is held personally liable for losses from his investments of trust funds on insufficient security, and he has obtained for the estate title to the property taken as security, the legatees must quit claim to him their claim to such property as a condition precedent to his paying the losses.

SAME CONTINUED.

28. Where an executor, in satisfaction of mortgage debts, has accepted conveyances of the incumbered land and also foreclosed mortgages, and, on the sale, has taken deeds therefor to himself as executor, he must, as a condition precedent to his discharge and the release of his bondsmen, convey the premises to the legatees as tenants in common.

COSTS IN EQUITY—APPEAL.

29. The Supreme Court may, in its discretion, assess the costs and disbursements of an appeal against the successful party, under Section 566, B. & C. Comp.

From Multnomah: JOHN B. CLELAND. Judge.

Statement by MR. JUSTICE MOORE.

This proceeding in the matter of the Estate of Caroline H. Roach, Deceased, was instituted in the County Court of Multnomah County by Eva M. Roach and others, legatees, to compel James Humphrey, an executor, to render a final account. Caroline H. Roach, by her last will, executed April 7, 1888, gave to her husband, B. H. Roach, the sum of \$10, and devised and bequeathed the remainder of her property equally to her children. The will contains, *inter alia*, the following clauses:

"I desire and direct my executors to keep said property until my said children shall arrive at the age of majority, unless in their judgment it would be for the best interest of my said children to sell such portion of the real estate as shall not be yielding any rental, and put the proceeds at interest. And I further authorize and direct my said executors to use such of my said property or the income thereof as shall be necessary to support, maintain and educate my said children."

Mrs. Roach died December 12, 1892, leaving her husband and the following named children: George H., Eva M. and Grace A. Roach. Her will was admitted to probate in that county, and her brother, James Humphrey, who was named in the testament as one of the executors thereof, was appointed and duly qualified for the trust. He filed an inventory of the property of the estate, which consisted of money in the sum of \$1,493.67, promissory notes of the face value of \$24,175.75,

which were appraised at \$19,671, certain real property in the City of Portland, which had been the family home, and household goods therein, valued at \$6,000 and \$300, respectively, and six shares of the capital stock of the Elkhorn Mountain Gold Mining Company, considered worthless—thus making the entire appraisement \$27,464.67. The possession of the home was retained by B. H. Roach as tenant by the courtesy, and the household goods were, by order of the county court, delivered to the children, who hereafter will be designated as the legatees. The executor made regular semiannual reports of the money which he received and disbursed, until October 14, 1895, when, having paid all the debts of the estate and the bequest to B. H. Roach, he made no further statements to the county court of his dealings with the property until December 22, 1903, at which time he filed a final account, pursuant to a citation issued when the youngest child attained her majority. The several reports show that the legatees have received from the executor, on account of their support, maintenance and education, the sum of \$11,895.50. Humphrey claimed in the final report, in addition to the compensation prescribed by law, a further remuneration of \$50 a month during the 11 years he discharged the trust, or \$6,600, for special duties performed \$1,175, and for office rent \$818, making a total of \$9,193, besides attorney's fees for probating the will \$50, and for preparing the final account \$100. Objections to certain items contained in the final account were filed by the legatees, whereupon the executor filed a supplemental and explanatory account, which showed that he had on hand for distribution \$9,575.61 in money, besides certain real and personal property. A stipulation was entered into by the parties, to the effect that the explanatory statements contained in the supplemental account correctly detailed the facts responsive to the objections interposed, except in certain particulars, the right to controvert which was reserved by the legatees. The executor thereupon asked for a further allowance of \$750, with which to compensate the attorneys who had been employed to resist the objec-

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tions. The cause was tried by the county court, and from the testimony taken it was decreed that the executor should be granted a further credit of \$285.90, as statutory compensation, in excess of the sum claimed therefor in the final account, thus reducing the sum reported on hand to \$9,289.71, in addition to which he was charged with the sum of \$7,561.69, and allowed only \$75 of the sum demanded for probating the will and for preparing the final account, thereby requiring him to account for and pay to the legatees \$16,926.40. The claim for extra compensation, attorney's fees for resisting the objections, office rent, etc., was denied.

From this order and from such parts of the decree as required an accounting for any sum in excess of that reported for distribution, the executor alone appealed to the circuit court for that county, where the cause was tried on a transcript of the testimony given in the county court, from which evidence findings of fact and of law were made; and, based thereon, the decision appealed from was affirmed as to the rejection of the executor's claim for extra compensation, special services performed, office rent and attorney's fees for opposing the objections, and also the allowance of \$285.90 for his commission, in excess of the amount claimed therefor, thus reducing the sum reported on hand for distribution, as found by the county court, to \$9,289.71, in addition to which it was decreed that Humphrey should be charged with a payment claimed to have been made June 16, 1903, to George H. Roach, of \$75 and interest thereon, amounting to \$83.21, with money improperly credited to H. E. Pike, \$239.53, and to Mrs. M. E. Allen, \$450, with losses sustained by reason of loans made on inadequate security, together with interest, attorney's fees, costs and disbursements incurred on account thereof, the makers of the promissory notes, evidencing the money borrowed, and the sums due from each thereon, being as follows: George P. Lent \$2,092.69; L. M. Cox and James P. Shaw \$3,094.62; and L. Hughes \$1,150.50; with squandering occasioned by purchasing the unsecured promissory notes of Willis Thorp \$5,206.25; and with

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injury incurred by purchasing certain lots in Mount Tabor Villa, and in the management of such property, \$737.91—thus requiring the executor to account for the sum of \$22,344.22, with interest thereon at the legal rate until paid. Humphrey was also ordered to convey and assign to the legatees certain real property, promissory notes and shares of stock, and it was decreed that upon the payment to each of them of one-third of the sum for which he was required to account and a compliance with the other parts of the decree he was to be discharged and his bondsmen exonerated. He was allowed the sums claimed as attorney's fees for probating the will and for preparing the final account. The executor appeals to this court from all parts of the decree that require him to account for a greater sum of money than he reported on hand for distribution, and from the disallowance of his claim for extra compensation, attorney's fees for controverting the objections, etc. The legatees also appeal from the rejection of other sums of money, for the payment of which they insist the executor is personally liable; from the allowance of his commission of \$955.20, and from the award of his attorney's fees in the sum of \$150.

MODIFIED.

For appellant there was a brief over the names of *Beach & Simon* and *Clinton C. Palmer*, with oral arguments by *Mr. Jarvis Varnal Beach* and *Mr. Palmer*.

For respondents there was a brief with an oral argument by *Mr. Hayward Hamilton Riddell*.

Opinion by MR. JUSTICE MOORE.

It is contended by Humphrey's counsel that the clauses of the will quoted imposed upon their client executorial duties upon the performance of which he became a trustee, and that, having fully discharged the first obligation, as is evidenced by his semiannual report of October 14, 1895, a trust in the property of the estate immediately attached, whereby the jurisdiction of the county court terminated and that of the circuit court attached; and, this being so, the former court was power-

less to act in the matter, and hence an error was committed in refusing to dismiss the proceedings.

Our statute prescribes the time and order of payment of charges and claims against a decedent's estate (B. & C. Comp. § 1212), upon the discharge of which the legatees are to be paid and the remaining proceeds of the personal property distributed among the heirs or other persons entitled thereto: B. & C. Comp. § 1220. This enactment would seem to make it incumbent upon the personal representative of the decedent to settle the estate committed to him within a reasonable time after assuming charge thereof, and it would also appear that when, by the terms of a last will, an executor is required to carry out the direction of a testator, the performance of which cannot reasonably be accomplished within the time implied from the statute, a trust is thereby imposed.

1. However this may be, in a general sense every executor is a trustee for the legatees and the next of kin (Willard, *Executors*, 36), and it will be assumed, without deciding the question, that the will under consideration required Humphrey, after paying the debts of the estate and the bequests that had matured, to perform the duties pertaining to a testamentary trustee.

2. In the discharge of such a trust the county court, as a probate tribunal, had no control, but the circuit court, as a court of equity, alone had jurisdiction of the subject-matter.

3. When a person has been appointed by a testator to execute the bequests of a will, and also vested by such testament with an interest in or a power over the property which, after the testator's death, he is to perform for the benefit or to the use of another, the relation of the person so appointed to the estate, when legally committed to him, must, upon principle, be the same as if a branch of the duty were delegated to one person as executor and the remaining part to another as trustee. In the case supposed, a moment's reflection would seem to induce the conclusion that, when an executor lawfully secures possession of the property of a decedent's estate, any inter-

meddling therewith by a testamentary trustee, until the executor has been discharged, would be regarded by the probate court as the usurpation of its authority, for, as the testator's debts, funeral expenses, etc., must be paid before any trust can attach to the property, under a devise or bequest thereof, the jurisdiction of such court necessarily precedes that of an equity tribunal, and is therefore exclusive.

4. When the same person has been appointed by a will to perform such dual duty in respect to the property of an estate, no service is demanded of him as testamentary trustee until he has fully performed his executorial obligation and secured an order of the probate court discharging him and liberating his bondsmen. Thus in *Prindle v. Holcomb*, 45 Conn. 111, it was held that the probate records should show that an executor's account had been settled, before a testamentary trustee was entitled to take and hold the property of the estate for the purposes of the trust. In *White v. Ditson*, 140 Mass. 351 (4 N. E. 606: 54 Am. Rep. 473), in speaking of an executor, the court say: "While Healy fully completed the administration of the estate by the payment of all the debts, legacies and expenses, he settled no final account as executor, and did not, by any open, notorious act, discharge himself as such in the probate court by assuming to transfer the residue of the property to himself as trustee, or by any other act indicating an intention thereafter to hold the same for the purposes of the trust. * * As actual payment cannot be made by one to himself, it has been held that, where the same person is executor and trustee, he must give bond in his character of trustee before he can exonerate himself from his liability as executor."

5. In the case at bar, it does not appear that Humphrey gave a new undertaking as trustee. He did not secure an order of the county court, discharging him as executor; nor did he do anything from which it can reasonably be inferred that he intended to change his relation to the property, except in failing to file semiannual reports of the receipt and disbursement of money, until compelled to render a final account. Such neglect, however, is ineffectual to change his executorial relation,

and his duty to the estate and the rule of law by which he should be governed is tersely stated in the case of *Bellinger v. Thompson*, 26 Or. 320 (37 Pac. 714, 40 Pac. 229), where Mr. Chief Justice BEAN, in speaking of another executor, observes: "It may be that the will gave him two characters, those of an executor and trustee, but the duties of the one are separate and distinct from and independent of the other; and until he was discharged from the former and assumed the duties of the latter, his liability as executor still continued." In support of the legal principle thus announced, see, also, 18 Cyc. 1112; 1 Woerner, Am. Law Admr. (2 ed.) 346; *Dougherty v. Bartlett*, 100 Cal. 496 (35 Pac. 431); *Prior v. Talbot*, 10 Cush. 1; *Cruce v. Cruce*, 81 Mo. 676; *Foster v. Wise*, 46 Ohio St. 20 (16 N. E. 687; 15 Am. St. Rep. 542); *Wallber v. Wilmanns*, 116 Wis. 246 (93 N. W. 47).

The only adjudication which we have found that at all seems to controvert the rule thus proclaimed, and that does not involve the power of a probate court to compel the filing of a final account, is *Vohmann v. Michel*, 109 App. Div. 659 (96 N. Y. Supp. 309), where it was held that when a testatrix devised her residuary estate to trustees, as such, who were also executors, a loan made by them of a part of the residuary estate, secured by a mortgage, was not an executorial performance, but the act of trustees, though they had not, at the time of the loan, accounted as executors, or been discharged as such, or formerly transferred the property of the estate to themselves as trustees. The effect of that decision, however, is very much weakened by a modification of the decree on appeal, where the conclusion ultimately reached was placed on other grounds: *Vohmann v. Michel*, 185 N. Y. 420 (78 N. E. 156; 113 Am. St. Rep. 921).

6. The jurisdiction of the county court of Multnomah County was admitted when Humphrey secured from it a confirmation of his nomination as executor. Its authority was recognized when he made to it his semiannual reports, and, as nothing has ever been done by him to defeat the right of that court to hear and determine the matter, it was empowered to

compel a final settlement of the estate, and no error was committed in refusing to dismiss the proceedings: *In re Osburn's Estate*, 36 Or. 8 (58 Pac. 521: 5 Prob. Rep. Ann. 148).

7. It will be remembered that the county court awarded the legatees \$16,926.40, and that the circuit court gave them \$22,344.22. As the executor alone appealed from such parts of the decree of the county court as required him to account for a greater sum of money than he reported on hand for distribution, his counsel maintain that the power of the circuit court was limited to the adjudication made by the county court, and that, in decreeing the recovery of a greater sum, an error was committed. The statute regulating the manner of reviewing the final determinations of a court, so far as thought to be important herein, is as follows:

"Upon an appeal from the judgment of a county court * * the action shall be tried anew, upon substantially the issues tried in the court below": B. & C. Comp, § 555.

"Upon an appeal, the appellate court may affirm, reverse or modify the judgment or decree appealed from, in the respect mentioned in the notice, and not otherwise * * and may, if necessary and proper, order a new trial": B. & C. Comp, § 556.

"Upon an appeal to the circuit court, the manner of proceeding thereafter is the same as if the action or suit had been commenced in such court; but if the appeal be from a decree of the county court, the appellate court may give a final decree in the cause or matter, to be enforced as a decree of such court, or such decree as may be proper, and direct that the cause or matter be remitted to the court below for further proceedings in accordance therewith": B. & C. Comp, § 558, subd. 3.

In construing these provisions, it has been held that final decrees of circuit courts were to be modified only in the manner specified in the notice of appeal, and that, when no cross-appeal is taken, it will be presumed that the respondent is satisfied with the determination of the cause, as made by the court below: *Shook v. Colohan*, 12 Or. 239 (6 Pac. 503); *Portland Construction Co. v. O'Neil*, 24 Or. 54 (32 Pac. 764); *Smith v. Wilkins*, 38 Or. 583 (64 Pac. 760). Though the mode of procedure in probate practice is declared to be in the nature

of a suit in equity, as distinguished from an action at law (B. & C. Comp. § 1100), we do not think the rule which has been applied in this court in cases of appeals from parts of decrees given in circuit courts governs appeals from final decisions rendered by county courts, in matters pertaining to the settlement of decedents' estates. The county court is not technically a court of equity, but the proceedings had therein, in the administration upon estates, are analogous to the practice in courts of chancery: *Richardson's Guardianship*, 39 Or. 246 (64 Pac. 390); *Rutenic v. Hamakar*, 40 Or. 444 (67 Pac. 196). Interpreting, *in pari materia*, the sections of the statute quoted, the power to modify a decree appealed from, "in the respect mentioned in the notice, and not otherwise," is limited in our opinion to this court, and does not apply to cases on appeal from the final determinations of a county court in probate matters, a transfer of which removes the entire cause to the circuit court, where it is tried as if it had been originally instituted therein, except that the review is confined to an examination of the transcript sent up. The power to order a new trial does not exist in cases of appeal from the decrees of the county court in probate matters (*Plunkett's Estate*, 33 Or. 414: 54 Pac. 152), and, as the practice in reviewing such decrees is not the same as on appeal from the final determinations of the circuit court, no error was committed as alleged.

8. It is maintained by Humphrey's counsel that the circuit court erred in requiring the executor to account for sums of money to which no objections were made, and on grounds other than those stated in the exceptions. When, in administering upon a decedent's estate, a final account is filed, a day must be appointed for hearing objections thereto and for the settlement thereof: B. & C. Comp. § 1202. Any person interested in the estate may, on or before the day so designated, file his objections to the final account or to any item thereof, "specifying the particulars of such objections": B. & C. Comp. § 1203. The requirement which the statute thus imposes to indicate the precise exceptions relied upon was evidently designed, in the

system of pleading, as an answer, controverting the statement of facts contained in the final account, which is treated as a complaint, and such objections are apparently intended to impart notice to the personal representative of the decedent, so as to enable him to prepare for a trial of the issues thus framed: 18 Cyc. 1172; *Elder v. Whittemore*, 51 Ill. App. 662; *Succession of Bofenschen*, 29 La. Ann. 711. The court's examination of the facts challenged by the exception is therefore limited to the particular specification set forth in the objections interposed. In conformity with this rule, the items of the final account that are contested will be examined.

9. The objection to the credit of \$75, claimed as money given to George H. Roach, June 16, 1903, is based on the ground that no such payment was ever made. The person to whom the money is asserted to have been delivered testified that he never received it, while the executor declared under oath that, though this credit was entered on his books, he was unable to find any receipt therefor, and that he had no personal recollection of the matter. The court properly disallowed the sum so claimed to have been paid.

10. In the prayer, which forms a part of the objections, in referring to this item, it is asked that the executor be required to account for \$75. No declaration is made in the exception of any sum being due as compensation for the use of money on account of this item, and in allowing \$8.21 as interest thereon an error was committed, necessitating a modification of the decree by remitting the sum last named.

11. The items noted in the final report:

"Henry E. Pike, on account of loan, \$239.53,"
and

"Mrs. M. E. Allen, not on previous acct., \$450,"
are not challenged in any manner, and the rejection thereof from the credit side of the account was erroneous, necessitating a further correction of the decree in these particulars.

12. The objections state that, without any order from the county court, Humphrey lent money to persons who, as evi-

dence thereof, executed promissory notes which were inadequately secured by mortgages of real property. In the investment of trust funds, though an executor is not an insurer, he is nevertheless required to exercise that degree of care and discretion which an intelligent person of ordinary prudence and judgment would observe in the management of his own affairs: 11 Am. & Eng. Enc. Law (2 ed.), 944; 7 Current Law, 1445; 18 Cyc. 233. "In lending money on mortgage of real estate, a degree of care is necessary, which, if omitted," says a learned author, "will render the executor liable personally": 2 Woerner, Am. Law Admr. (2 ed.), 709. In *Bogart v. Van Velsor*, 4 Edw. Ch. 718, it was ruled that, when an executor loans funds on real estate, he must use care as to the title, and ascertain that the value of the premises mortgaged is such as will, in all probability, be adequate security for repayment whenever the money shall be called in. In rendering that decision, Mr. Justice McCoun says: "The criterion of value in such cases is the opinion or estimate of men of ordinary prudence who would deem it safe to make a loan of the like amount of their own money on the same property." In *Clark v. Anderson*, 13 Bush, 111, it was held that a trustee was not chargeable with a loss resulting from a loan which was secured by a mortgage on real estate of cash value 50 per cent greater than the sum loaned, when the loss was caused by an unexpected depreciation of the worth of the property after the loan was made and which was occasioned by a financial crisis. In *Per-rine v. Vreeland*, 33 N. J. Eq. 102, an executor loaned money, taking as security therefor a mortgage on unimproved city lots, worth at the time of the loan more than three times the amount of the fund; and it was determined that he was not personally liable for any loss that might result from his purchasing the property under a decree of foreclosure. In *Wilson v. Staats*, 33 N. J. Eq. 524, an executor having taken a first mortgage on a farm to secure a loan equivalent to two-thirds of the value of the land, it was held that he was not answerable for any loss that subsequently accrued. F. S. Akin, a witness for the

legatees, testified that he had been engaged in lending money and taking real estate mortgages as security therefor, and that a prudent person would not place on such property more than 50 per cent of the sum of money which could reasonably be obtained at a voluntary sale of the land for cash.

13. Applying the rule which is to be derived from the decisions on this branch of the case, and from the opinion of an expert witness in such matters, it appears that the executor on October 26, 1893, loaned one George P. Lent \$1,000, taking as security therefor a mortgage of 160 acres of unimproved land, situated on the Clackamas River, about five miles east of Oregon City; that on May 28, 1894, Humphrey made another loan to Lent of a like sum, secured by a mortgage of 80 acres of timber land, situated about 40 miles east of the other tract. The promissory notes evidencing the loans not having been paid at maturity, the mortgages were foreclosed, and at a sale of the premises under the decrees the executor became the purchaser and secured deeds of the premises. He sold the 80 acres June 22, 1903, for \$500, and on October 7th of that year he sold the 160-acre tract for \$1,350, paying a commission of \$100 to an agent for securing a purchaser of the latter premises, and three days thereafter, in consideration of \$150, the executor entered satisfaction of the deficiency judgment rendered against the mortgagor. The circuit court found that at the time these loans were made the value of the 160 acres did not exceed \$800, and that the worth of the 80 acres was not more than \$120. The executor was charged with the sums so loaned and interest thereon at 8 per cent per annum until October 14, 1898, when the rate was changed to 6 per cent (*Laws 1898, p. 15*), and continued thereafter at the latter rate. He was also charged with attorney's fees and other expenses incurred in the foreclosure proceedings, and credited with the interest paid and money received from the sale of the land and on account of the judgment, whereby there remained due \$2,092.69. The commission paid for securing a purchaser was not taken into consideration, and only \$1,250.

the sum realized upon a sale of the 160 acres, was credited to the executor's account as to the larger tract of land. Lent testified, as a witness for the executor, that he considered the loan on the 160 acres perfectly safe, and the other loan reasonably good. It is not deemed necessary to set out in detail the testimony of the witnesses as to the values of the respective tracts of land referred to, for a careful perusal of the evidence convinces us that the finding of the circuit court in relation thereto is correct. Lent stated what he considered the land to be worth, but his opinion is not the best evidence, for it must be kept in mind that he was the borrower, and, as it will be assumed that he was honest, he necessarily entertained an opinion that the land mortgaged afforded adequate security, and, though he was a competent witness, he was not disinterested.

14. Whenever an executor's final account is properly challenged, the burden of proving the truth of the item or the reasonableness of any credit thus objected to devolves upon him.

15. Humphrey did not call an impartial witness to state that, Humphrey did not call an impartial witness to state that, in his opinion, a prudent man of discretion and judgment would, in the management of his own affairs, have loaned such sums of money on unimproved land so remote from market, 160 acres of which, as appears from the testimony, had very little saw timber thereon, and the remaining 80 acres contained trees that were fit only for piling. The failure of the executor to introduce testimony as to the criterion of value and the method of determining it, as prescribed in the case of *Bogart v. Van Velsor*, 4 Edw. Ch. 718, was probably due to the fact that he could not find a qualified, unbiased witness who would have considered the loans safe investments. Humphrey did not, in our opinion, meet the requirement which the rule of *onus probandi* thus imposed upon him by offering only Lent's testimony, as to the value of the land, each tract of which was inadequate security for the money loaned thereon. The sum demanded in the objections on account of the loss resulting from the money loaned to Lent, on both tracts, is \$2,004.20. The decree re-

quires the executor to account for \$2,092.69, or \$88.49 more than is claimed by the legatees, and hence a modification must be made by remitting the sum last named.

16. L. M. Cox and James P. Shaw purchased lots 1 and 2 in block 60 of Caruthers' Addition to Caruthers' Addition to the City of Portland, agreeing to give therefor \$5,000, of which sum they paid two-thirds, the remainder of the purchase price being evidenced by promissory notes secured by a mortgage of the premises. Humphrey, on February 11, 1893, procured an assignment of one of these notes, given for \$833.33, and on October 17, 1895, he obtained a transfer of the other note, evidencing a consideration of \$847. These negotiable instruments not having been paid, the mortgage was foreclosed, and the premises sold to the executor for \$2,000, thereby leaving a deficiency judgment of \$514.95, which sum included attorney's fees, costs, etc. The circuit court found that the lots specified are situated in a ravine, about 80 feet below the grade of the street, and that at the time the notes were assigned to the executor the mortgaged premises were of no greater value than \$500, and computing the sum due, as hereinbefore indicated, it was decreed that the executor should account for the sum of \$3,094.62 by reason of the loss sustained from accepting the inadequate security. Cox and Shaw, the mortgagors, as witnesses for the executor, severally testified that, when they purchased the property, they considered it worth the sum of money which they agreed to pay for it; that on February 11, 1893, the time when Humphrey secured an assignment of the first note, no depreciation in the value of real property in the City of Portland had occurred, but in June of that year the worth of all such lots began to grow less, in consequence of a great financial depression. These lots at the time they were purchased by the mortgagors evidently had a speculative value, but, being unimproved and owing to their situation, they had no real worth as a basis for security; and we think the court's finding in relation thereto is supported by the great weight of testimony. The witnesses for the legatees severally stated on

oath that this property was of but very little value, and the executor did not call any unbiased witness of experience and judgment to express an opinion as to what sum of his own money, if any, a reasonably prudent man would have loaned on two unoccupied city lots, situated in a canyon, which the testimony shows to be about a mile from the center of business of the city, and where the improvement of the highway upon which the lots abut, would, in all probability, many times exhaust the value of the property by the assessments imposed thereon. It will be remembered that the prices of all real property in the City of Portland had commenced declining when the executor obtained an assignment of the second note, in view of which and of the circumstances referred to in connection herewith no error was committed in requiring him to account for the sum found to be due.

17. Humphrey on May 15, 1894, loaned L. Hughes \$600, taking as security therefor a second mortgage on lot 1 in block 6 in Paradise Spring Tract, Multnomah County, and also on 10 acres in section 7 in township 1 N. of range 2 E. of the Willamette Meridian, which latter tract is situated in a marsh. The executor on June 11, 1895, lent Hughes the further sum of \$54.35, which was not secured in any manner. The first mortgage on the Paradise Spring Tract was foreclosed, and the lien of the second mortgage was extinguished thereby, without returning to the executor any part of the sum for which the premises were sold under the decree. Humphrey evidently thought the marsh land valueless, for, without attempting to foreclose the mortgage thereon, he permitted 10 years to elapse after the last payment was made on the debt intended to be secured. The court found that the estate lost by this transaction \$1,150.30, for which sum the executor was required to account. If a loss occurs by reason of an executor's taking a second mortgage on real property as security for a loan, made for that purpose, he is liable therefor: *Wilson v. Staats*, 33 N. J. Eq. 524; *Crane v. Howell*, 35 N. J. Eq. 374.

18. No testimony was offered by either party to show the

value of the 10-acre tract, but, as the burden of proving the adequacy of the security, which was controverted, devolved upon the executor, any failure in this respect is attributable to him.

19. So, too, it was incumbent upon him to have foreclosed the lien of the mortgage on the marsh land, if he considered the premises valuable, but, having failed to institute a suit for that purpose and allowed the statute of limitations to bar a recovery, he is personally liable for the loss which resulted from his culpable negligence: 2 Woerner, Am. Law Admr. (2 ed.), 677.

20. The sum of \$54.35, which the executor lent Hughes, though entered as an item of credit in the semiannual report of October 14, 1895, was not disputed by any objection. An error was therefore committed in requiring the executor to account for such sum and the interest thereon, amounting to \$90.30, thereby necessitating a modification of the decree in this particular.

21. Humphrey obtained an assignment of two unsecured promissory notes, June 11, 1895, executed by one Willis Thorp, each for the sum of \$1,250, and, only a small payment having been made on account of interest, a judgment was secured against the maker for the amount due, whereby the estate lost, including interest, attorney's fees, costs, expenses, etc., \$5,206.25, as found by the circuit court, for which sum it was decreed that the executor should account. The objection to this item is based on the ground that the executor is personally liable for any loss resulting from the loan of money of the estate without any security, and the sum demanded from him on account thereof is \$3,715.40. We have no statute regulating the management of trust funds, except when they are in the custody of a guardian (B. & C. Comp. § 5278), or where the sale of personal property of an estate is ordered by the county court to be made on credit (B. & C. Comp. § 1169), or in case of the sale of real estate when time is allowed for the payment of a part of the purchase price, by taking a mortgage as secur-

ity therefor upon the real property sold (B. & C. Comp. § 1177). "In the absence of statutory provisions touching the method of investment, executors and administrators," says a text-writer, "are bound to employ, in the investment of the funds of the estate, such prudence and diligence as, in general, prudent men of discretion and intelligence employ in their own affairs": 2 Woerner, Am. Law Admr. (2 ed.), 707.

In *Gray v. Fox*, 1 N. J. Eq. 259 (22 Am. Dec. 508), in discussing the duty demanded in the management of trust funds and in stating the origin of the legal principle applicable thereto Chancellor Vroom says: "It is, well settled in English chancery, that, if trustees loan money without due security, they are liable in case of loss by insolvency. This is a safe rule, and the court has no hesitation in adopting it. The duties of trustees are very important, especially when the rights of infants are concerned, and it will always be the pleasure of the court to protect them, so far as it may be done consistently with safety and sound policy. Safety demands that the conduct of trustees should be watched with scrupulous care. Sound policy requires that the faithful steward should not be entrapped and ruined with technicalities and forms. The rule above stated, however valuable as a general principle for the government of the court, is not sufficiently definite to be of much practical use. We must go further, and inquire what is due security for moneys loaned by a trustee. Can the court adopt a general rule, or must each case be left to be decided on its own peculiar circumstances?" After calling attention to several decisions rendered in Great Britain on this subject, it is observed: "The principle to be extracted from these authorities is that the loaning of trust money, and especially where infants are concerned, on private security, is not a compliance with the rule that requires due security to be taken, and, of course, that such loans are made at the risk of the trustee." Further in the opinion the chancellor remarks: "I am not able to ascertain that the English rule has ever been adopted in this court, and I should feel some hesitancy in adopting it to

the extent to which it is carried in their courts. The situation of the two countries differs very materially in many respects, and especially as it regards the policy of investments; and what may be a prudent rule of policy in one country may not be in another. In England, property can always be invested in funds. These are recognized by their courts as safe and permanent securities, and it is the policy of every branch of the government to consider them so. In this country, the amount of public or government stock is very small, and in an inland state like our own there are few opportunities for investing in that kind of security. The stock of private corporations is not considered safe, and investments in that species of stock would scarcely be encouraged by a court of equity. There is, then, no other but landed security that would come within this rule. This can most generally be attained, and the court would advise it to be taken in all cases where public stock cannot be procured."

The rule thus announced is firmly established in the state in which it was so promulgated (*Vreeland v. Vreeland's Adm'r*, 16 N. J. Eq. 512; *Tucker v. Tucker*, 33 N. J. Eq. 235; *Dufford's Ex'r v. Smith*, 46 N. J. Eq. 216; 18 Atl. 1052), and, as the legal principle declared is so consonant with reason in dealing with the property of infants, an extensive quotation has been made from the opinion in the leading case. The loss of trust funds in consequence of an omission to take adequate security is negligence, and an executor is personally liable for a failure to obtain a repayment of money of the estate lent without any security, whether or not the loan was made before or after the passage of an act prescribing the manner of investing funds by a trustee: *Judge of Probate v. Mathes*, 60 N. H. 433. See, also, on this subject, 2 Woerner, Am. Law Admr. (2 ed.), 708. Mrs. Roach not having directed in her will the manner of loaning the money of which she might die possessed, the executor is liable personally for that part of the loss occasioned by the purchase of the unsecured promissory notes of Thorp that is properly challenged.

22. The decree requiring the executor, in the settlement of his final report, to account for the sums so found to be due the estate, must necessarily be based upon the allegations and proof.

23. The legatees were not limited to their original objections, but they could have filed additional or amended exceptions at any stage of the proceedings to modify or enlarge their demand so as to make it correspond with the testimony produced (*In re Meeker's Estate*, 45 Mo. App. 186), but, not having done so, the decree must be changed so as to agree with the claim for \$3,715.40, thereby rendering a remission of \$1,490.85 unavoidable.

24. The transcript discloses that John H. Rathburn and his wife gave to J. Mosher their promissory note for \$800, and to secure the payment thereof they executed to him a mortgage upon certain lots in Mount Tabor Villa, Multnomah County. This note was assigned to Humphrey, but the mortgage was thereafter foreclosed by Mosher, and, on a sale of the premises under the decree, the executor became the purchaser thereof, and on November 20, 1903, he conveyed the lots to T. S. McDaniel for \$900, but prior thereto Humphrey received payments for the rent of buildings on the land. Several objections to this transaction having been interposed, the circuit court charged the executor with the sum paid Mosher for an assignment of the Rathburn note, the interest thereon, the taxes paid, and all other expenses incurred on account of the property, and credited him with the sum received on a resale of the lots and the amount obtained for rent, and found that there was due from him to the estate the sum of \$737.91, for which he was required to account. At the trial in the county court the executor's counsel stated that the sale of these lots was apparently made to Humphrey in his own name, and for that reason he should probably be charged with the money expended therefor, \$904, and interest thereon, and offered a settlement of the item on that basis. The counsel for the legatees refused to accept the tender, however, insisting that a greater sum was due from

the executor than would accrue by the system of computation suggested. The circuit court apparently adopted the proposition, and, having done so, its conclusion is within the demand and compatible with the solemn admissions of the executor's counsel made in open court, and hence the sum so found to be due will not be disturbed.

25. Humphrey's claim for extra compensation, attorney's fees, rent, special services performed, etc., having been denied, except as to the allowance of \$150 for probating the will and for preparing the final account, it is insisted that an error was thereby committed. Though the circuit court found that an office for the transaction of the business of the estate was not necessary, and that Humphrey had not performed any unusual or extraordinary services, and therefore his claim on account of the items last specified was denied, he was allowed the sum of \$955.20, compensation prescribed by law for discharging the duty devolving upon him. The accounts filed in the county court show that Humphrey claimed credits, amounting to \$2,258, for money expended on account of attorney's fees. The several sums to such agents, who were appointed by the executor and authorized to act for him, paid in securing judgments against the following named parties, were disapproved, to wit: George P. Lent \$225; Willis Thorp \$657; L. M. Cox and James P. Shaw \$176; L. Hughes \$25; and John H. Rathburn \$75—amounting to \$1,158, thereby allowing on account of attorney's fees \$1,100. It will be remembered that the circuit court granted the executor as attorney's fees for probating the will \$50, and for preparing the final account \$100, but no part of the sum was deducted from the award, in consequence of which the decree appealed from must be further modified to the extent of such allowance. The executor never applied to the county court for advice or direction as to the manner of loaning the money of the estate, and for more than eight years he made no report to such court of his dealings with the property in his possession, though required by statute to account therefor semiannually: B. & C. Comp. §1199. The law im-

posed upon him a duty in this respect, a breach of which is sufficient ground for denying him any extra compensation, office rent, or attorney's fees (11 Am. & Eng. Ency. Law (2 ed.), 1282), and by reason of such neglect his claim was properly rejected: *In re Estate of Holbert*, 48 Cal. 627.

26. The legatees appeal from that part of the decree which fails to require the executor to account to them for certain other loans of money of the estate on unsecured promissory notes whereby losses were sustained. Their objections do not assign the grounds now insisted upon, and hence no error was committed in denying the relief sought.

27. They also appeal from the order of the circuit court allowing Humphrey the compensation prescribed by statute, from the allowance of \$150; as attorney's fees, and from certain other items of credit granted him; but, believing that no errors were committed in these respects, the decree will be modified as hereinbefore indicated, by deducting from \$22,344.22, the sum for which the executor was required to account, as follows: Interest on money claimed to have been paid to George H. Roach \$8.21; the accounts of H. E. Pike \$239.53, and of Mrs. M. E. Allen \$450; the excess on account of loans made to George P. Lent \$88.49; L. Hughes, \$90.30; Willis Thorp, \$1,490.85, and attorney's fees \$150, not considered by the circuit court in its computation—making in all \$2,517.38, thus requiring the executor to account for \$19,826.84, with interest thereon at the rate of 6 per cent per annum from July 20, 1905, the day when the decree was rendered in the court below, and upon the payment to each of the legatees of one-third of that sum, and the performance of the conditions hereinafter specified, the executor will be discharged and his bondsmen exonerated. As a condition precedent to such payment, however, the legatees will be required to execute to Humphrey quitclaim deeds of all their right, interest or claim in or to any of the real property the title to which was secured for the estate upon the foreclosure of mortgages and sales thereunder, where the transactions have been hereinbefore disapproved,

to wit: Lots 1 and 2 in block 60, in Caruthers' Addition to Caruthers' Addition to the City of Portland, and also to assign to him any interest they may have in the deficiency judgment against L. M. Cox and James P. Shaw, the judgment rendered against Willis Thorp, and also to transfer to Humphrey any interest they may have in the promissory note of L. Hughes. Humphrey will be required to transfer to the legatees, as tenants in common, the shares of stock specified in the inventory, the deficiency judgment against the following named parties, to wit: J. V. Allen, and I. A. and C. L. Roper, Carrie C. Covey, and T. M. Rankin. And also to assign to them promissory notes executed by the following named persons: L. O. and A. M. Nelson, Edgar W. and J. K. Phillips, Catherine and P. L. Weiser, John and Lizzie Foster, W. O. Allen, C. M. Wiberg, and Frank Morgan and Angus Campbell.

28. The transcript shows that Humphrey in satisfaction of mortgage debts accepted conveyances of the incumbered land, and also foreclosed mortgages, and, on the sale of the real property effected thereby, took deeds therefor made to himself as executor, etc., and, in order that any right, title or interest he may have in such premises may be transferred, he will, as a condition precedent to his discharge and the liberation of his bondsmen, be required to execute to the legatees, as tenants in common, quitclaim deeds of the following described real property, to wit: Lots 3, 4 and 5, in block 13, in Southern Portland; lots H and I in Washington Addition to East Portland (now incorporated in the City of Portland), all in Multnomah County, State of Oregon; and also lots 10 and 11, in block 9, and lots 12 and 13, in block 28 in Frasier and Hyland's Addition to the City of Eugene, in Lane County, Oregon. We do not think it necessary to discuss, at this time, the question whether or not this court, in reviewing the action of a county court, in probate matters, can order a party to execute a deed to real property and to provide that, upon a failure or refusal to comply therewith, the decree shall operate as and for a conveyance of the premises; but we entertain no doubt of the

power of the county court, and hence of this court, to require the parties, as a condition precedent to the relief granted and of the accounting enjoined, to impose the burdens hereinbefore specified in respect to executing the deeds mentioned.

The decree appealed from will therefore be modified in the particulars indicated, but in all other respects affirmed, and the cause will be sent back to the circuit court to be remitted to the county court of Multnomah County, with directions to enter a decree therein as hereinbefore specified.

29. The executor will be allowed his costs and disbursements incurred in this court. MODIFIED.

Argued 9 October, decided 22 October, 1907.

REEDER v. REEDER.

91 Pac. 1075.

DEED—CAPACITY OF GRANTOR.

1. A person otherwise competent who understands and appreciates the nature and effect of a proposed transaction is competent to execute a deed.

DEED—EVIDENCE OF CAPACITY OF GRANTOR.

2. The evidence satisfactorily establishes that the grantor in the deed under consideration understood what she was about to do and intelligently accomplished a plan formed at some previous time.

DEED—SUFFICIENCY OF DELIVERY—DEATH OF GRANTOR.

3. A deed is delivered if it is given into the possession of a third person, without any power to recall it or change its disposal, with instructions to deliver it to a specified person after the grantor's death.

From Multnomah: JOHN B. CLELAND, Judge.

Suit to set aside a deed, resulting in a decree for defendant, from which this appeal is taken. AFFIRMED.

For appellants there was a brief over the names of *Edward & A. R. Mendenhall*, with oral arguments by *Mr. Alfred Rush Mendenhall* and *Mr. Thomas Griffin Hailey*.

For respondent there was a brief over the names of *S. H. Haines* and *Snow & McCamant*, with an oral argument by *Mr. Wallace McCamant*.

Opinion by MR. CHIEF JUSTICE BEAN.

This is a suit brought by F. B. Reeder and six other heirs of Catherine Reeder, deceased, to cancel and annul a deed from

the latter to her son, J. L. Reeder, for 140 acres of land in Multnomah County. About 1855 Catherine Reeder and her husband, S. M. Reeder, settled upon a donation claim of 320 acres on Sauvie's Island, and afterwards completed the required residence and cultivation, and received a patent, in which the south half of the claim was designated as inuring to the husband, and the north half to the wife. Mrs. Reeder and her husband continued to reside upon the claim until their death, rearing a large family, of which defendant is the eldest. About 1878 defendant married, and built a dwelling house on the north half of the claim, about a quarter of a mile from the family residence, in which he continued to live until 1894, when his house was destroyed by a flood. He thereupon built another dwelling, with the consent of his parents, and, as he testified, under a promise by them that, if he would continue to reside on and cultivate the place and look after them during their lifetime, the land should belong to him. He has ever since resided upon and cultivated the land in connection with his father and other members of the family. S. M. Reeder died in 1902, and his wife, Catherine Reeder, continued to live in the family home, with her son F. B. Reeder and her two daughters, Mrs. Godwin and Mrs. Akin, until her death on November 22, 1905. Mrs. Reeder was about 75 years of age at the time of her death, and for some years prior had been in feeble health, but was not confined to her room, except for perhaps a month before her death. About two weeks before she died she executed a deed, conveying her half of the donation claim, except the family home and 20 acres of land surrounding it, to defendant, in consideration of love and affection, and made a will disposing of the remainder of her property. The deed was in the possession of a third person until after her death, when it was delivered to defendant and by him put on record; whereupon this suit was brought by the other heirs to set aside the deed, on the ground that the grantor was mentally incapable of making a valid conveyance.

There is much testimony in the record, principally from in-

terested parties, concerning the mental condition of Mrs. Reeder at the time, prior, and subsequent to the making of the deed, and many witnesses testified that, in their opinion, she was so feeble in mind and body as to be unable to intelligently and understandingly dispose of her property. Others expressed the opinion that her mental faculties were as good as ordinarily possessed by persons of her age, and that she was perfectly competent to transact any ordinary business.

1. It is unnecessary to refer to the opinion evidence in detail. The uncontradicted testimony of S. H. Haines, who prepared the deed and before whom it was executed, shows beyond reasonable controversy that it was the act and deed of Mrs. Reeder, and that she fully understood and comprehended the nature and effect of the transaction. And this is sufficient to sustain the instrument as a valid conveyance: *Carnegie v. Diven*, 31 Or. 366 (49 Pac. 891); *Dean v. Dean*, 42 Or. 290 (70 Pac. 1039).

2. The defendant, J. L. Reeder, testified that, while on his way to his work, he stopped to see his mother on the morning of the 7th of November, and found her in good spirits. She claimed to be improving, and said she expected to be out in a day or two. She inquired when he would go to Portland, and he told her as soon as he finished digging potatoes, which would be about 11 o'clock of that day, and she requested him to secure the services of some person to make out some papers for her, the nature and character of which she did not indicate to him. He went to Portland that afternoon, and engaged S. H. Haines, an attorney of this court, to make out such papers as his mother might desire to execute. He and Haines went by boat that afternoon, and the next morning he took Haines over to his mother's house, and introduced him to her, and left them together in the room where the papers were prepared. He was not present at the time and did not know the contents of the papers until after his mother's death. Haines testified that the defendant came to his office in Portland on the 7th of November, and told him that his mother wanted to make out some

papers, relative to the final disposition of her property, and inquired if he could go down and attend to the matter for her, and he agreed to do so; that defendant was unable to tell him what character of papers his mother desired to execute, whether a will or deeds, and he, witness, inquired the number of children, and, being told by defendant, took with him a blank will and nine warranty deeds. He reached the Reeder place about 4:30 o'clock in the afternoon, and he remained over night with defendant, and the next morning went with him to Mrs. Reeder's residence. He had never seen Mrs. Reeder and was not acquainted with any of her children, except defendant. When they went into Mrs. Reeder's room, she was lying in the bed, and defendant spoke to her, inquiring after her health, and then introduced witness to her, and told her he had come to prepare such papers and transact such business for her as she might wish or desire, and then left the room. What afterwards transpired is thus detailed by Haines:

"I moved my chair up a little closer to the old lady, as I noticed that she was inclined to be a little deaf, and I asked her what I could do for her. She says: 'I want to draw up some papers that should have been (I think she used the words "should have been") fixed up long ago.' And she says: 'I have waited as long as I am going to, and I want now to straighten out my property.' I asked her whether she wanted to convey her property by will or by deed, and she says: 'I want to make a deed to J. L. Reeder for his home, and will make a will for the balance of the property.' I then took and drew up, I am not certain whether I drew the will up or the deed up first, but my impression is I drew the will up first; and she told me that she wanted to leave the property equally to each of the heirs, excepting J. L. Reeder, who had received his portion by deed. That he was not to share in any of the other property. I drew the will exactly in accordance with her direction. After drawing up the will, I then took a deed and filled in the forepart of the deed or commencement of the deed until I got to the description of the property. Then I asked her if she could give me the description of the property she wanted to deed to J. L. Reeder, and she says: 'I want to give J. L. Reeder the north half of the original donation land claim.' I think she said S. M. and Catherine Reeder, that I cannot say.

and I wrote the deed in accordance with her description, and she designated the north line thereof to be the north side of a road running east and west across the place and over the slough as being the north boundary line to the property she wanted conveyed to J. L. Reeder. She stated at that time that she wanted the bridge that goes over the slough to be on J. L. Reeder's portion, as he would never block the bridge so that the others could not pass, while she was afraid that the others would prevent him from crossing over, and for that reason she also made the north side of the road the boundary line to J. L. Reeder's portion, so she stated. I wrote the description in the deed just as she dictated it, and she afterwards signed, executed and acknowledged it before me.

Mrs. Reeder's mind at the time was exceptionally good, and she perfectly understood what she was about. In talking over the conveyance she said the reason why she wanted J. L. to have this property was that he had always stayed at home and has spent a good deal of money on the property, in fixing it up, has 'always assisted Pa and I, and always looked after us, and seen that we were properly cared for, and is the only one that has ever taken an interest in the place; that when his house was washed down we told him to build where his present house stands, and that would be his portion of the estate, and that this conveyance is in accordance with the agreement which Pa and I had often talked and agreed upon.' After the papers were prepared and I read the will twice aloud to Mrs. Reeder so she understood each and every word, and I also read the deed to her carefully and slowly and she understood it. When I got through, I said: 'Now, Mrs. Reeder, if there are any changes you want to make, now is the time to make them, and if it is not correct, now is the time to correct them.' And she said they were just as she wanted them. I was very careful in reading the papers to her. She was old and hard of hearing, but not quite as hard of hearing as has been pictured, or did not seem so to me. I sat quite close to her and talked no louder than I am talking now, and she understood each and every word. I had to repeat but very little to her.

After the papers were drawn up I said: 'Mrs. Reeder, we have to have a witness. Is there any one around here you know of that can witness the will and deed?' She said there is a Mr. Bonser here, but that some of her family had married into that family or there was a relation there that she did not care to have mixed up in the deed, as that would tell the contents. and she did not want them to know the contents of her papers.

She said: 'Mr. Banks lives right down here, and I think he will witness it'—would I go down and try him? I told her I would, and I looked at my watch, and it was then about 12 o'clock. I had been with her from 9 or 9:30, in that neighborhood. I told her it was now lunch time and I would go up to J. L.'s and eat lunch, and would then go and get Mr. Banks, and would come back and she could then sign the papers, and she said very well. I put the papers in my pocket, and went up and got my lunch, and afterwards Mr. Hayes, a son-in-law of Mr. Reeder's, and I, went down to Mr. Banks' place, and got him to come up and witness the deed. When we reached Mrs. Reeder's house, Mr. Banks and I walked up on the porch, and I took hold of the knob and found the door locked. I rang the bell and some one unlocked the door, and pulled it open probably two or three inches, and went into another room. I don't know, I never saw, who unlocked the door. And we walked into the room where Mrs. Reeder was. She thereupon executed the will and deed, and Mr. Banks and myself signed as witnesses. After the papers were executed, she talked to us a few minutes, and then we went away. I put the papers in my pocket, and Mr. Banks and I walked up to the orchard of J. L. Reeder, where Mr. Reeder and a force of men were pulling beets in the orchard, and I told Mr. Reeder I had a deed for him, but it was not to be recorded until after his mother's death, and he said: 'You take and keep it then until such time as it is necessary to put on record.' I did not show the deed to him, or show him its contents, unless it was to tell him that it was for his home place."

This testimony of Haines is absolutely undisputed, and the witness stands wholly unimpeached, and there is therefore no reason why full credence should not be given to his evidence. It shows that the deed was the voluntary act of Mrs. Reeder, and that she fully comprehended the nature of the transaction in which she was engaged. Under these circumstances and upon such a record the court would not be justified in disturbing her disposition of her property on account of old age, sickness or debility of body.

Some suggestion was made at the argument that the deed was the result of undue influence and fraud. It is doubtful whether the averments of the complaint are sufficient to raise

these questions; but, however that may be, there is no testimony whatever to support them.

3. The point was also made in the brief, though not much relied on at the argument, that there was no such delivery of deed as would pass title. The testimony shows that the deed was delivered by Mrs. Reeder to Haines to be held by him until her death, and then delivered to defendant. All control of the deed passed from her at the time it was delivered to Haines. She thereafter had no right to recall it, and this is a sufficient delivery within the law: *Hoffmire v. Martin*. 29 Or. 240 (45 Pac. 754).

Without further reference to the testimony, it is sufficient to say that from a careful examination of the entire record we are satisfied that the findings of the trial court should not be disturbed, and the decree is therefore affirmed. **AFFIRMED.**

Decided 30 July, 1907.

PUTNAM v. STALKER.

91 Pac. 863.

TRIAL—NONSUIT—INFERENCES FROM EVIDENCE.

1. On a motion for a nonsuit every reasonable inference from the evidence must be deduced in favor of the plaintiff, and those facts must be assumed to be true which the jury might fairly find under the testimony.

MALICIOUS PROSECUTION—DUTY TO INSTRUCT AS TO PROBABLE CAUSE.

2. In actions for malicious prosecution, where the facts are admitted or established, it is the duty of the trial judge to declare their legal effect, and not to leave that matter to the untrained judgment of a jury.

SAME—EFFECT OF PLAINTIFF HAVING BEEN HELD TO ANSWER BY COMMITTING MAGISTRATE.

3. The fact that the plaintiff in an action for malicious prosecution was examined before a committing magistrate, when witnesses were called for both sides, and was held to answer, establishes a *prima facie* case of probable cause for the arrest, subject to evidence that the action of the magistrate was induced by fraud or other improper influence.

SAME—SUFFICIENCY OF EVIDENCE.

4. The evidence in this case clearly shows that defendant acted in good faith in making the charge complained of, and relied on the advice of the district attorney, to whom he had previously fully and fairly communicated all the facts within his knowledge.

SAME—EFFECT OF ADVICE OF PROSECUTING ATTORNEY.

5. One who consults the district attorney before commencing a criminal prosecution and discloses to him all the facts which he knows or has reason to believe, and is advised to begin a prosecution, does not act without probable cause, even though by diligent search he might have discovered other and exculpatory facts, if he acted in good faith on the advice so received.

From Grant: GEORGE E. DAVIS, Judge.

Statement by MR. COMMISSIONER SLATER.

This is an action for malicious prosecution by H. N. Putnam against J. L. Stalker. On March 27, 1906, defendant caused plaintiff to be arrested at Canyon City, Grant County, on a warrant issued by a justice of the peace, based on an information sworn to by defendant, charging plaintiff with having obtained from defendant on March 9, 1906, the sum of \$37.50, under false pretenses. By reason thereof, plaintiff was confined in the county jail for 41 days. On May 21, 1906, at the regular term of the circuit court for that county, the prosecuting attorney returned into court an information indorsed "not a true bill," and thereupon plaintiff was discharged. In addition to the foregoing facts, plaintiff alleges that the prosecution was without probable cause and was actuated by malice, concluding with proper and usual allegations of damages. By his amended answer, defendant, by general denial, traverses the whole complaint, and, as a further defense, alleges the facts on which the charge was based; that, after making an investigation of all the circumstances, he submitted all the facts within his knowledge, through his attorney, to the deputy district attorney for that county, who advised defendant that there was probable cause for prosecuting plaintiff, and requested defendant to make and file the information on which the warrant was issued; that, acting in good faith, and relying upon the advice of the deputy district attorney, he made the information; that on April 25, 1906, a legal preliminary examination of the charge against plaintiff was had before the magistrate, at which evidence was introduced and witnesses were sworn and examined, both on behalf of the state, represented by the deputy district attorney, and on behalf of defendant in said cause, who appeared in person and by his attorney, and, after a full and fair hear-

ing of the cause, plaintiff herein was held by the magistrate to await the action of the grand jury at the next term of circuit court, and was admitted to bail in the sum of \$250, and, being unable to give the same, he was committed to the custody of the sheriff of the county; that these acts of the defendant are the same acts stated in the complaint; and that the charges preferred were true. By the reply there was a general denial of the new matter of the answer. The cause was tried before a jury, and at the close of plaintiff's case defendant moved for a nonsuit, which was overruled by the court. He also requested of the court an instruction for a verdict in his behalf, based upon a claim that he had established by uncontroverted and competent evidence the defense that the prosecution was upon the advice and direction of the prosecuting attorney, which requested instruction was denied. The verdict was for plaintiff in the sum of \$120, on which judgment was accordingly entered, and from which defendant appeals. Error is assigned upon the overruling of the motion for nonsuit and the refusal of the court to instruct the jury as requested by the defendant, as well as upon admission of testimony objected to by defendant.

REVERSED.

For appellant there was a brief with an oral argument by *Mr. Errett Hicks*.

For respondent there was a brief over the names of *Victor G. Cozad* and *A. D. Leedy*, with an oral argument by *Mr. Cozad*.

Opinion by MR. COMMISSIONER SLATER.

1. By his motion for nonsuit, defendant invoked the ruling of the court on the legal effect of the evidence of plaintiff to support his cause of action. Upon such motion every intendment and every fair and legitimate inference which can arise from the evidence must be made in favor of plaintiff, and the court must assume those facts as true which the jury can properly find under the evidence: *Wallace v. Suburban Railway Co.* 26 Or. 174 (37 Pac. 477; 25 L. R. A. 663). And if the evidence tends to show facts which will sustain the action, though

remote, the motion for nonsuit should not be sustained: *Herbert v. Dufur*, 23 Or. 464 (32 Pac. 302).

2. If the testimony offered by plaintiff tends to show that the defendant had good reason to believe that the law had been violated, and he acted in good faith, it is the duty of the court to declare the legal effect of the evidence by allowing the motion for nonsuit. "The welfare of society," says Mr. Justice BEAN, in *Hess v. Oregon Baking Co.* 31 Or. 503, 513 (49 Pac. 803), "imperatively demands that those who violate the law shall be promptly and speedily punished, and to accomplish that purpose the rule has been firmly established that any citizen who has good reason to believe that the law has been violated may cause the arrest of the supposed offender, and, if in doing so he acts in good faith, the law will protect him against an action for damages, although the accusation may in fact be unfounded. This rule is founded on grounds of public policy to encourage the exposure of crime, and the punishment of criminals, and when, therefore, the act of a citizen in thus enforcing the law is challenged, the court must determine the question, when the facts are admitted or established, whether he had probable cause for so doing, and not leave it to the arbitrament of a jury."

3. At the outset of his case, plaintiff offered, and there was received, the transcript of the proceedings in the justice court, which contains the information sworn to by defendant before the magistrate on March 27, 1906, and the warrant issued thereon, and upon which plaintiff was arrested on the 27th day of March, 1906, and on the next day was committed by the magistrate to the custody of the sheriff of the county. But it further shows that on April 25, 1906, a preliminary hearing was had before the magistrate upon the charge, and after an examination duly held according to law, at which the state appeared by the deputy prosecuting attorney for that county, and the plaintiff appeared in person and by his attorney, and after three witnesses had been examined on behalf of the state, and two on behalf of plaintiff, including himself, he was held to answer at

the next term of the circuit court for that county, and was admitted to bail in the sum of \$250. This evidence, instead of showing the want of probable cause, the burden of showing which was upon plaintiff, makes, it would seem, a *prima facie* case of probable cause. "It is quite generally held," says Mr. Justice WOLVERTON, in *Stamper v. Raymond*, 38 Or. 16 (62 Pac. 20), "that, where proof was offered upon the examination which is deemed sufficient by the committing magistrate upon which to commit, his commitment accordingly will afford *prima facie* evidence of probable cause." The effect of the commitment as evidence of probable cause, however, may be overthrown by other evidence showing that it was obtained by false pretenses or other improper means: *Sharpe v. Johnston*, 76 Mo. 660; *Giusti v. Del Papa*, 19 R. L. 338 (33 Atl. 525); *Womack v. Circle*, 29 Grat. 192. But, unless it is overthrown by testimony of that character, it becomes conclusive, and must prevent the plaintiff from prevailing.

4. We are unable, however, to discover in the record any evidence on the part of plaintiff tending to show, and in fact it does not seem to have been claimed by him, that there was any fraud or other improper conduct on the part of this defendant at the preliminary examination which prevented the plaintiff from obtaining a full and fair hearing, or that the conclusion announced by the magistrate was the result of any improper conduct of defendant; nor are we able to find any evidence on part of defendant in this case, after his motion for nonsuit was overruled, by which the *prima facie* case of a probable cause, made out by the commitment, was overthrown. The court, therefore erred in denying the motion.

At the close of the testimony, defendant by his counsel requested the court to instruct the jury as follows:

"The court instructs the jury that the fact is before you and is not disputed that, before the defendant began the criminal action described in the complaint in this case, he was advised by J. E. Marks, Deputy District Attorney for the Ninth Judicial District of Oregon for Grant County, to institute the said

criminal action, and that before receiving such advice there had been laid before the said deputy district attorney all the facts and circumstances in the knowledge of the defendant relating to the charge against the plaintiff, and that the said deputy district attorney also made an investigation of his own motion of the charge against the plaintiff, and that after making such investigation, and after receiving all such facts and circumstances, advised the defendant to institute said criminal action, and that defendant acted on such advice in good faith; and I instruct you as a matter of law that such fact constitutes probable cause for said criminal action, and I instruct you to return a verdict for defendant."

This requested instruction was denied by the court, and, an exception to the ruling having been taken by the defendant, error is assigned thereon. It appears from the testimony that defendant, soon after having given plaintiff the order for the books, and after having paid plaintiff the sum of money charged to have been obtained under false pretenses, became suspicious of plaintiff's good faith and his right to receive the money as an agent for the proprietors of the work, and on that account defendant consulted with his attorney, A. M. F. Kircheiner, in regard to the matter, giving him a full, fair and correct statement of all that had transpired between the parties. It transpired that this attorney and R. R. McHaley, residents of that neighborhood, also had recently had transactions with plaintiff similar to those which had taken place between him and defendant, and on which the criminal information was based, and under the same circumstances. These three persons, after talking the whole matter over among themselves, becoming convinced that they had been swindled, and that they would never be supplied with the books, made an investigation to ascertain the correctness of the statements and representations made to each of them by plaintiff when taking their orders and receiving their money.

To that end communications were addressed to the Bureau of National Literature and Art in Washington, D. C., plaintiff's reputed principal, and to Mr. C. T. Brown, general manager of the Washington Post at Kansas City, Mo., which was, since

June, 1905, the successor in interest to all of the proprietary rights in the sale and distribution of the books in question, formerly possessed by said bureau. On March 19, 1906, the Bureau of National Literature and Art, through E. M. Hunt, its assistant treasurer, replied that Putnam had not been in its employ for a long time, and saying:

"We have been endeavoring to ascertain his whereabouts. * * If Mr. Putnam is still in your locality we would thank you to advise our Mr. C. T. Brown, 601 Century Building, Kansas City, Mo., at his expense by wire. Mr. Putnam's work has been very irregular, and we intend to put a stop to it. We should be pleased to receive this information if possible."

On March 21, 1906, Kircheiner received a telegraphic message from Brown to have Putnam arrested; but, fearing to act on such request without further information, Brown was advised by Kircheiner to forward a warrant. On March 25th following, the sheriff of the county received from Brown this telegram:

"Arrest H. N. Putnam claiming to be representative of Bureau of National Literature and Art. Charge, collecting and retaining trust fund."

Plaintiff was arrested and taken into custody by the sheriff, acting upon this order, but without warrant; but he immediately advised Brown that he would not hold plaintiff unless a proper warrant was forthwith furnished, and on March 27th he received from Brown this message:

"A. M. Kircheiner of Prairie City, Or., will make charge against Putnam. If not, collect all supplies belonging to Bureau of National Literature and Art and let go."

All these matters were fully disclosed to the deputy district attorney by Kircheiner acting for himself and for the defendant, and by R. R. McHaley. The deputy district attorney had talked with both of these persons, and they testified that they had fully and fairly disclosed to him all the facts within their knowledge regarding not only plaintiff's transactions with defendant, but also plaintiff's dealings with them concerning the sale of books, and the evidence shows that the defendant had previously dis-

closed to Kircheiner and McHaley all the material facts within his knowledge upon which the criminal charge was afterwards based, and that Kircheiner was acting as defendant's attorney and was advising him as to what he should do in the matter. The deputy district attorney also swears that he was made fully acquainted with all the facts of the case by McHaley and Kircheiner, and that he had in fact been investigating appellant's conduct for a month or six weeks previously, and was well advised concerning his transactions, and based on such knowledge and information he advised Kircheiner to have his client, Stalker, the defendant, swear to the information, because he then believed there was sufficient evidence to hold plaintiff. He preferred that Stalker should make the information, instead of either Kircheiner or McHaley, because Putnam had admitted to McHaley that he had not forwarded Stalker's order, which fact made a stronger case against plaintiff, while they had no evidence as to whether plaintiff had forwarded McHaley's or Kircheiner's orders and money. This testimony is corroborated by both Kircheiner and McHaley. The latter testifies that he expressed his willingness to make the information himself; but, the deputy district attorney advising that Stalker had the stronger case, the latter was the proper person to make the charge, and he was requested to swear to the information. Defendant swears that he was so advised and requested by his attorney, and that, relying upon the advice of the deputy district attorney, conveyed to him through his attorney, and acting in good faith, he appeared before the magistrate and swore to the information.

5. There is nothing in the record that in any way controverts any of these sworn statements, and it must result that it is established that defendant in making the charge complained of acted in good faith, relying upon the advice of the deputy district attorney, who had previously been fully and fairly advised of all the facts within the knowledge of the defendant. "The rule seems to be that where one seeking in good faith the advice of a public prosecuting officer about the commencement of a

criminal prosecution discloses to such officer all the facts and circumstances within his knowledge, or which he has reasonable ground to believe, relating to the offense, and is advised by that officer to institute the prosecution, his defense of probable cause will be established if he acted in good faith upon such advice, even though there were other exculpatory facts which he might have ascertained by diligent inquiry": *Hess v. Oregon Baking Co.* 31 Or. 503, 513 (49 Pac. 803). An effort was made by plaintiff to challenge defendant's good faith in prosecuting the plaintiff by attempting to show that the prosecution was instituted by him, aided by Kircheiner and McHaley, with the object in view to force plaintiff to return to them the several amounts of money he had obtained from them. But it is sufficient to say, without reviewing the testimony in detail, that the attempt wholly failed. There was no testimony offered by plaintiff from which a jury could have drawn an inference of bad faith on the part of defendant in that connection. Each of his witnesses, offered for that purpose, testified that the defendant stated that, while he would like to have his money back, he was willing to forego that and to prosecute the plaintiff, because he believed him guilty. The court was in error when it refused the requested instruction.

It follows, therefore, that the judgment should be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion. **REVERSED.**

Argued 16 July, decided 6 August, 1907.

WOLFER v. HURST.

91 Pac. 306.

APPEAL—REVIEW OF INTERMEDIATE ORDER—HARMLESS ERROR.

1. On appeal complaint cannot be made of an order modifying a temporary injunction without the notice expressly required by statute, unless it shall appear that the injunction should have been permanently ordered.

ENJOINING TRESPASS—IRREPARABLE INJURY.

2. To justify a court of equity in enjoining a trespass it must appear that an irreparable injury will be inflicted unless the writ is issued.

INJUNCTION—INSOLVENCY—BOND ON APPEAL.

3. The insolvency of a defendant in a forcible entry and detainer action is immaterial in a suit to enjoin him from removing chattels from the premises in question pending the determination of such action, where the defendant appealed from the judgment and gave a bond for double the rental value and for restitution.

FORCIBLE ENTRY AND DETAINER—APPEAL—SUFFICIENCY OF UNDERTAKING—PRESUMPTION.

4. Where on judgment for plaintiff in a forcible entry and detainer action defendants gave a bond under the express terms of Section 5754, B. & C. Comp., guaranteeing payment of twice the rental value of the land should judgment be affirmed, the undertaking must be presumed sufficient for the objects given, and is effectual for all purposes until the final determination of the cause, in the absence of objections or exceptions thereto.

INJUNCTION—REMEDY AT LAW.

5. Where a defendant in forcible detainer has given the statutory bond for double rent, such bond affords an adequate remedy at law for the damage caused by seizing the crop pending the appeal, and bars an injunction to prevent removing such crop before the final determination of the law action.

From Marion: WILLIAM GALLOWAY, Judge.

Suit by George J. Wolfer against W. H. Hurst and another.
From a decree dismissing the complaint, plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Bonham & Martin*, with an oral argument by *Mr. Carey Fuller Martin*.

For respondents there was a brief over the name of *Carson & Cannon*, with an oral argument by *Mr. Anderson M. Cannon*.

Opinion by MR. COMMISSIONER KING.

This is a suit to enjoin defendants from removing or in any manner disposing of a crop of hops from plaintiff's farm until the final determination of a forcible entry and detainer action between the parties herein pending in the supreme court of this State: 47 Or. 146 (80 Pac. 419, 82 Pac. 20). At the time of the filing of the complaint a decision affirming the judgment of the court below in the proceeding referred to had been filed. The mandate was withheld awaiting the consideration of a petition for rehearing. The complaint alleges, in effect, that plaintiff is the owner of and entitled to the immediate possession of the property involved in the action mentioned; that defendants forcibly and wrongfully took possession of the premises, which possession they wrongfully and unlawfully retain

and hold by force, for the purpose of securing and applying to their own use the crop of 1905, consisting of 10,000 pounds of hops, valued at \$1,500, with the intention of selling and removing the same from the land and beyond the jurisdiction of this court, before the mandate of the supreme court can possibly be procured; that defendants have been and are cultivating the crops in an improper manner and willfully and maliciously tearing up and injuring the hop vines, thereby and otherwise causing irreparable injury to the estate; that the appeal from the proceedings in the former case was taken, and the petition for rehearing filed, for the purpose of delay, in order to defraud plaintiff, as aforesaid; that in taking the appeal the undertaking given was only for the sum of \$250; that such sum is insufficient to protect the plaintiff in damages and loss which will result from the acts complained of; that defendants are insolvent, and unable to respond in damages; and that the rental value of the premises for the year 1905 was about \$1,500. On the facts alleged a decree is asked to the effect that plaintiff be declared the owner of the alleged crop free from any claims or liens thereon; that defendants be enjoined from selling or disposing of the crop grown on the premises involved in the former action, or in any manner incumbering the same with a mortgage or other lien, or from removing any part thereof from the jurisdiction of this court, until the final determination of this suit, during which time it was prayed that defendants and their agents be enjoined from in any manner molesting plaintiff's property; that pending the final determination herein a receiver be appointed to take possession of the property, with power to employ the necessary help and to harvest and dispose of the crops, as the court might direct. Upon the filing of the complaint, a temporary restraining order was issued, in accordance with the request, except as to the appointment of a receiver.

An answer, by way of a plea in abatement, was filed, to which a demurrer was sustained and the plea dismissed. An answer was then filed to the merits, admitting the existence of the for-

mer proceeding and that it was in the supreme court, alleged the facts leading to the institution of the forcible entry and detainer action; that defendants had occupied the premises during the pendency of the action throughout the different courts in good faith; had expended \$875 in cultivation, growing of the crop, etc., thereon; that the hop crop had been picked by them at the time of the commencement of this suit, and that plaintiff had no right nor title thereto. To the affirmative allegations of the answer a demurrer was filed and sustained, on the ground that they did not state facts sufficient to constitute a defense.

On an *ex parte* motion of the defendants the temporary restraining order was modified, by permitting the removal of the hops from the hophouse on the premises, which were directed to be stored in a warehouse of the Southern Pacific Railway Company at Hubbard, Oregon, a receipt taken therefor, and immediately deposited with the clerk of the court, awaiting the final determination of this suit. Testimony was taken before the court, and, based upon findings therefrom to the effect that defendants were not insolvent, and that plaintiff has a plain, speedy and adequate remedy at law, a decree was entered dismissing the complaint. At the time the decree of dismissal was entered, it appearing to the court, by affidavit, that the defendants had loaded the disputed hops, for shipment, on cars of the Southern Pacific Railway Company, an order was made by the court, to the effect that defendants return the same to the warehouse of said railway company at Hubbard, Oregon, to be left there until the final determination of the proceedings on appeal. From the decree dismissing the complaint plaintiff appeals.

1. It is maintained by the plaintiff that the court erred in modifying the temporary restraining order, without notice having been given to plaintiff in accordance with B. & C. Comp. § 422. The effect of the action of the court in dissolving or modifying an order, under the circumstances named, can only be material when it shall be found that plaintiff is entitled to such relief.

2. The question, then, for determination and the only point urged, necessary to be considered here under the record, is: Had plaintiff a plain, speedy and adequate remedy at law? If answered in the affirmative, it disposes of the point mentioned, as well as the entire case; for, if plaintiff has such remedy, the error suggested, if it can be termed such, could not have been prejudicial to plaintiff, nor would the action of the court in dismissing the complaint be erroneous. Whatever may be the rule in other states, it is settled here that, in absence of a showing to the effect that the acts complained of amount to an irreparable injury to the estate, a court of equity will not enjoin a trespass thereon: *Moore v. Halliday*, 43 Or. 243 (72 Pac. 801: 99 Am. St. Rep. 724); *Hume v. Burns*, 50 Or. 124 (90 Pac. 1009).

3. The evidence does not disclose that any permanent injury was either done or threatened to the premises. The manner of caring for the hops and cultivation thereof is not shown to be such as would result in permanent injury to the estate. The testimony bearing on the subject indicates only a difference of opinion as to the proper manner in which such hops should be handled; and, whatever may have been the proper method of cultivation thereof, no damage of any serious consequence is established, either actual or threatened. Our statute has this provision, when an appeal is taken in a forcible entry and detainer action:

"If judgment be rendered against the defendant for the restitution of the real property described in the complaint, or any part thereof, no appeal shall be taken by the defendant from such judgment until he shall, in addition to the undertaking now required by law upon appeal, give an undertaking to the adverse party, with two sureties, who shall justify in like manner as bail upon arrest, for the payment to the plaintiff of twice the rental value of the real property of which restitution shall be adjudged from the rendition of such judgment until final judgment in said action, if such judgment shall be affirmed upon appeal": B. & C. Comp. § 5754.

It could make no difference, therefore, as to the alleged insolvency of the defendants in view of the undertaking provided by

the statute, which entitled plaintiff to recover double the rental value of the property for the time during which the action was pending. The undertaking given for that purpose was executed in the forcible entry and detainer action by the defendants and two sureties, and guarantees payment of twice the rental value of the land, in the event of the court adjudging restitution to plaintiff. While the sureties only justify in the sum of \$500 each, no limitation is placed on their liability under the instrument. No objection appears to have been made to the sufficiency of the undertaking, nor is it alleged or attempted to be shown that the sureties are insolvent.

4. In the absence of objections or exceptions thereto, the undertaking must be presumed sufficient for the objects given, and is effectual for all purposes until the final determination of the cause mentioned: 47 Or. 156 (80 Pac. 419, 82 Pac. 20).

5. It is evident that the object of this statute was to protect the owner against loss in a case of this kind, while the proceedings are pending on appeal and until the final determination of the rights of the parties involved, thereby making an injunction unnecessary to secure him against any loss occasioned during the interim, except where irreparable injury to the estate is shown.

The question as to whether plaintiff is entitled to recover the value of the crop or be left solely to his remedy on the undertaking, or as to whether it is in his discretion to rely upon either, is not necessary to a decision herein. But should it be assumed that plaintiff, after obtaining judgment ousting defendants from the land, upon which the crop was raised, was entitled to the possession of the produce grown thereon during the pendency of the proceedings, he would still have an efficient remedy at law: *Parsons v. Hartman*, 25 Or. 547 (37 Pac. 61: 30 L. R. A. 98: 42 Am. St. Rep. 803); *Moore v. Halliday*, 43 Or. 243 (99 Am. St. Rep. 724: 72 Pac. 801); *Myer v. Roberts*, 50 Or. 81 (12 L. R. A., N. S., 194: 89 Pac. 1051); *Jones v. McKenzie*, 122 Fed. 390 (58 C. C. A. 96).

It follows from any view that might be taken, under the evi-

dence, that plaintiff has an ample remedy at law, for which reason the decree of the court below should be affirmed.

AFFIRMED.

Decided 30 July, 1907.

STATE v. REYNER.

91 Pac. 301.

INDICTMENT—OBJECTION AT TRIAL FOR INSUFFICIENCY.

1. Under Section 1365, B. & C. Comp., an objection to an indictment because the facts therein stated do not constitute a crime may be made at the trial under a plea of not guilty.

FACTS CONSTITUTING LARCENY FROM THE PERSON.

2. Where the defendant and the prosecuting witness agreed to exchange vests and the defendant received the garment from the witness, whereupon he suddenly and without the consent of the witness took therefrom articles of value, he is guilty of larceny from the person, prohibited by Section 1800, B. & C. Comp.

LARCENY FROM A STORE AND FROM THE PERSON—NATURE OF OFFENSE—ELEMENT OF VALUE OF PROPERTY.

3. The crimes of larceny from a store (Section 1799, B. & C. Comp.) and larceny from the person (section 1800) are compound larcenies, consisting of simple larceny (section 1798), aggravated by the circumstance of taking the property from a store or the person of another, in which the value of the property is not an ingredient of the offense, as in the case of simple larceny.

LARCENY—GREATER AND LESS DEGREES.

4. A charge of larceny from a store or from the person includes a charge of simple larceny, and under either of the former charges the defendant may be convicted of the last.

INDICTMENT—WAIVER OF OBJECTION OF DUPLICITY.

5. Though an indictment is open to demurrer if the facts stated constitute more than one crime, or one crime in several forms, an objection on that ground must be taken by demurrer or it is waived.

SUFFICIENCY OF DUPlicitous INDICTMENT TO SUPPORT CONVICTION.

6. No demurrer having been filed to an information charging more than one offense, they not being inconsistent, a conviction of the lesser of the two will be sustained.

An information charging larceny from a store, a compound larceny, and also alleging the value of the property, not being demurred to as charging two offenses, will sustain a verdict and judgment based on a simple larceny; the verdict determining the value of the property taken.

CRIMINAL LAW—WAIVER OF OBJECTION OF INSUFFICIENCY OF EVIDENCE—MOTION TO ACQUIT.

7. An objection because of the insufficiency of evidence on a material point must specifically point out the defect or it will be considered waived.

TRIAL—DISCRETION AS TO QUESTIONS NOT SHOWING BIAS.*

8. Objections to questions tending to humiliate a witness, but not to show bias or prejudice, are wisely sustained in the discretion of the trial court.

*NOTE.—On this subject see *State v. White*, 48 Or. 416, headnote 5.

TRIAL—INSTRUCTION AS TO DEGREES—NEED OF REQUEST.

9. Where a charge necessarily includes several degrees of crime, an instruction that the jury may find the defendant guilty of the lesser degree if they have a reasonable doubt of his guilt of the higher degree must be specially requested or it need not be given: *State v Cody*, 18 Or. 506, overruled.

CRIMINAL LAW—EVIDENCE OF PREVIOUS CONVICTION AS AFFECTING CREDIBILITY.

10. Under Section 862, B. & C. Comp., providing that a witness may be impeached by the record of his previous conviction of a crime, a court may properly instruct the jury that the record of a previous judgment of guilty of a crime may be considered in determining the weight to be given to the testimony of a defendant.

From Union: THOMAS A. CRAWFORD, Judge.

F. K. Reyner appeals from a conviction of a crime.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Charles H Finn*.

For the State there was a brief over the names of *A. M. Crawford*, Attorney General, and *I. H. Van Winkle*, with an oral argument by *Mr. Crawford*.

Opinion by MR. JUSTICE MOORE.

The defendant, F. K. Reyner, was convicted of the crime of larceny and sentenced to imprisonment in the penitentiary for the term of three years, from which judgment he appeals.

His counsel contend that the information does not state facts sufficient to constitute a crime, and that the evidence produced at the trial was insufficient to warrant a conviction, and hence the court erred in denying their request to instruct the jury, as follows: "I charge you that, under the testimony, you must find the defendant not guilty." The information, omitting the title, the *contra formam statuti* clause, the signature of the prosecuting officer, the names of the witnesses and other indorsements, is as follows:

"F. K. Reyner, the above-named defendant, is accused by the District Attorney for the Tenth Judicial District of the State of Oregon, in this information, of the crime of larceny in a building, committed as follows: The said F. K. Reyner did, in the County of Union, and State of Oregon, on the 15th day of November, 1906, wrongfully, unlawfully and feloniously take, steal and carry away in a certain store building, to wit,

the Owl Saloon, a certain sum of money, to wit, the sum of \$80, lawful money and currency of the United States, the denominations thereof to the district attorney unknown, said money being then and there the personal property of one Louie Fagin, and of the value of \$80."

No demurrer to the formal accusation was interposed; but, a plea of not guilty having been entered, the defendant's counsel objected and excepted to the introduction of any incriminating testimony against their client. Such evidence, though controverted, tended to show that, at the time stated in the information, the defendant was temporarily employed as a bartender in a saloon at La Grande; that the prosecuting witness, Louie Fagin, visited such resort, having in his vest pocket a roll of bills, whereupon the defendant proposed an exchange of vests with him; that Fagin removed his vest and handed it to the defendant, who, turning his back to such witness, took from the garment and retained the roll of bills, and thereupon handed the vest back to the owner. Fagin, as a witness for the State, in describing the money alleged to have been taken from him, testified that the night preceding his loss he left with one W. C. Hesse, at La Grande, for safe-keeping, "two \$20 pieces in paper, four \$10 bills, and one \$10 in gold," and the next morning received the same, placing the paper money in his vest pocket and the gold in a purse, which he carried in his trousers pocket. The testimony of this witness is corroborated by that of Hesse as to the denomination and kind of money left with and given back by him. H. C. Cotner, the proprietor of the saloon where the defendant was employed, testified that, upon returning to his place of business, after a short absence, he found Fagin censuring the defendant for taking from him a package of paper money, saying:

"This foreigner was accusing this man Reyner, over there, that he had taken a roll of greenbacks from him, his money, and he pulled open his coat that way, and said: 'He took it out of there.' * * Of course, he talked broken, but he made me understand there were \$85 in it in greenbacks, paper money, and he says, 'There is two \$20 greenbacks, bills,' and he made me understand the balance of it was \$5 and \$10 bills."

W. W. Crawford testified that he was in Cotner's saloon, November 15, 1906, and saw Fagin take "from his pocket what looked like greenback bills, and put them back in his coat pocket." The foregoing is the only testimony tending in any manner to identify the kind of money alleged to have been taken, or to establish its value, and, based on such evidence, the court said to the jury:

"When you retire, gentlemen, you will select one of, your number as foreman, who will sign whatever verdict you agree upon. If you are satisfied from the evidence in this case beyond a reasonable doubt of the guilt of the defendant, as I have indicated to you, you will sign and return this verdict:

'We, the jury in the above-entitled criminal action, find the defendant, F. K. Reyner, guilty of larceny, and the value of the property stolen \$——,' filling in the number of dollars, the value of the property stolen, and sign it above the word 'Foreman.'"

An exception to this part of the charge was reserved by the defendant's counsel. Pursuant to the direction, however, the jury inserted in the verdict the following: "\$80.00."

The information hereinbefore set out is evidently based on an alleged violation of Section 1799, B. & C. Comp., which, so far as involved herein, is as follows:

"If any person shall commit the crime of larceny in any dwelling house, banking house, office, store, shop or warehouse * * and commit the crime of larceny therein, such person, upon conviction thereof, shall be punished," etc.

As this section is entitled "Larceny in House, Boat, or Public Building," it is argued that the crime of larceny in a building is not classified as a special offense under our statute, unless such structure is used by the public, and the defect in the information was not remedied by the averment "in a certain store building," for the idea intended to be expressed by the use of that phrase is to charge the commission of an offense in a building, rather than in a store.

1. The failure of an information to state facts sufficient to constitute a crime may be taken advantage of at the trial, as was done in the case at bar, under plea of not guilty (B. & C.

Comp. § 1365), thereby making an examination of the charging part of the formal accusation necessary.

2. Before considering such question, however, attention is called to the testimony, which, it will be remembered, tended to show that the money alleged to have been stolen was taken by the defendant from a vest which was delivered to him by Fagin, the owner of the property. If it be assumed that the money was abstracted from the garment under the circumstances adverted to, the stealing was larceny from the person, provided the taking was without Fagin's knowledge or consent, or so suddenly as to preclude resistance before asportation: *Rapalje, Larceny*, § 16; *McClain, Crim. Law*, § 575; *Commonwealth v. Lester*, 129 Mass. 101.

3. Our statute, prohibiting such thefts and prescribing the measure of punishment therefor, is as follows:

"If any person shall commit the crime of larceny by stealing from the person of another, such person shall, upon conviction thereof, be punished," etc.: B. & C. Comp, § 1800.

The conviction herein was undoubtedly based on a violation of Section 1798, as amended by Laws 1905, p. 83, which, so far as considered material in the case at bar, is as follows:

"If any person shall steal any goods or chattels, or any government note, bank note, * * which is the property of another, such person shall be deemed guilty of larceny, and upon conviction thereof, if the property stolen shall exceed in value \$35, shall be punished by imprisonment in the penitentiary not less than one nor more than ten years; but if the property stolen shall not exceed the value of \$35, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one month nor more than one year, or by fine not less than twenty-five nor more than one hundred dollars."

An examination of the provisions of the statute relating to stealing from any dwelling house, etc., or from the person of another, will show that the commission of such crimes is a compound larceny, consisting of simple larceny, aggravated by the circumstance of taking personal property of the class designated from a building in which it has been placed for safety,

or from the person of another, who is awake and has the goods, chattels, or choses in action under his immediate observation and protection (*State v. Patterson*, 98 Mo. 283: 11 S. W. 728), in which cases the value of the property taken is not an ingredient of the offense.

4. Larceny in a dwelling house or from the person of another is therefore a crime of greater magnitude than simple larceny, and, either of the former being a crime consisting of degrees, the larger offense necessarily includes the smaller.

5. The information stated the value of the property taken, but such averment was unnecessary, and, if it be assumed that the designation of "a certain store building" was a sufficient compliance with the requirement of the statute to make the offense larceny in a house of the specified class, the accusation might have been construed as stating facts constituting the commission of two crimes. Notwithstanding it is enacted that a written accusation must charge but one crime, and in one form only (B. & C. Comp. § 1308), and a failure to comply therewith renders the pleading demurrable (B. & C. Comp. § 1357, subd. 3), if the information is not thus challenged on account of its double aspect, the defect is waived: B. & C. Comp. § 1305; *State v. Lee*, 33 Or. 506 (56 Pac. 415); *State v. Carlson*, 39 Or. 19 (62 Pac. 1016, 1119).

6. No demurrer to the pleading was interposed in the case at bar, and as the offense charged was a compound larceny, the information is sufficient to uphold the verdict and judgment, which are based on simple larceny, where the worth of the property taken is alleged and determined by the verdict, thereby removing any doubt on that subject (*State v. Hanlon*, 32 Or. 95: 48 Pac. 353; *State v. Savage*, 36 Or. 191: 60 Pac. 610); and no error was committed in directing a finding as to such value.

7. It is maintained by defendant's counsel that no direct proof was offered tending to show that the property claimed to have been stolen was "lawful money and currency of the United States," as alleged in the information, and that there was an

entire failure to establish the value of the bills asserted to have been taken, and for these reasons the testimony was insufficient to authorize a finding as to such value; and hence the court was at fault in denying the request to give the instruction hereinbefore set out, and also erred in charging the jury as follows:

"I instruct you that government notes in the form of greenbacks, silver certificates, or gold notes, and national bank notes, are current moneys of the United States, and are subject of larceny under our statutes."

To the giving of this an exception was saved. It will be recalled that the testimony tended to show that the property alleged to have been unlawfully taken consisted of two \$20 and four \$10 bills in greenbacks. These bills were not specifically identified, nor was any person called as a witness to prove the value thereof. If the court's attention had been particularly attracted to the failure of proof in the respect indicated, it is quite probable that, notwithstanding both parties had rested, the cause would have been opened so that evidence of the kind and value of the bills might have been supplied. This court was established to correct, after careful deliberation, the errors alleged to have been committed in the hurry of a trial by a circuit court; but, unless the latter tribunal has had an opportunity to pass upon the question that is brought to this court for examination, the consideration thereof would not be a review, as contemplated by the rules of law, but the contemplation of an independent inquiry, which, if sanctioned, would permit a party to an appeal to try a cause upon an entirely different theory from that pursued in the court below. To obviate such a system of procedure, a party who seeks to review the action of a trial court on account of a lack of evidence, of which he complains, is required particularly to point out to it the legal principle for the maintenance of which he contends, and, if he fails to do so at the proper time, any error, unless there is a total failure of proof, is necessarily waived: *State v. Tamler*, 19 Or. 528 (25 Pac. 71; 9 L. R. A. 853); *State v. Foot You*, 24 Or. 61 (32 Pac. 1031, 33 Pac. 537); *State v. Robinson*, 32

Or. 43 (48 Pac. 357); *State v. Fiester*, 32 Or. 254 (50 Pac. 561); *State v. Schuman*, 36 Or. 16 (58 Pac. 661: 47 L. R. A. 153: 78 Am. St. Rep. 754); *State v. Sally*, 41 Or. 366 (70 Pac. 396). As there was some evidence introduced at the trial tending to establish the identity and value of the paper money alleged to have been stolen, and as the request for an instruction to find a verdict of "not guilty" did not particularly specify the ground on which it was based, no error was committed in refusing to charge the jury as desired, or in giving the instruction hereinbefore set out and assigned as error.

8. A. P. Southwick, having testified as a witness for the State, was not permitted, on cross-examination, to answer the following question: "And didn't you a majority of the time 'bum' your meals off the free-lunch counters of the saloons?" The defendant's counsel thereupon stated to the court that they expected to prove, by the answer sought, that the witness was a vagrant and a tramp; but, all testimony to that effect having been rejected, an exception was reserved, and it is insisted that an error was thereby committed. If Southwick had given an affirmative answer to the question asked him, or if the defendant's counsel had been permitted to prove the truth of the declaration which they made to the court, the state of feeling existing between the witness and the defendant would not have been disclosed. The necessity of answering such a question as was propounded to Southwick, who did not interpose a claim of privilege, is to be determined by the trial court as a matter within its discretion, which will not be disturbed, except in cases of an abuse thereof: *State v. Bacon*, 13 Or. 143 (9 Pac. 393: 57 Am. Rep. 8); *State v. Chee Gong*, 17 Or. 635 (21 Pac. 882); *State v. Olds*, 18 Or. 440 (22 Pac. 940); *State v. Welch*, 33 Or. 33 (54 Pac. 213). We do not think there was any abuse of discretion in refusing to permit the witness to answer the question asked or in rejecting the proof offered.

9. The defendant's counsel, invoking the principle announced in the case of *State v. Cody*, 18 Or. 506 (23 Pac. 897, 24 Pac. 895), insist that, when an information charges the commission

of a crime, which necessarily includes a lesser offense, it is incumbent upon the court, without any request therefor, to instruct the jury that they have the right to find the accused guilty of the lesser crime, if they entertain a reasonable doubt as to his guilt as to the greater offense, and that, no charge to that effect having been given, an error was committed. In *State v. Foot You*, 24 Or. 61 (32 Pac. 1031, 33 Pac. 537), the doctrine promulgated in the case relied upon was expressly overruled, and hence no error was committed, as alleged.

10. The court gave to the jury the following instructions:

"The State has introduced in evidence in this case the judgment roll in the case of the State against Fred Reyner, wherein the defendant therein was charged with the crime of assault with a dangerous weapon, and, upon a plea of guilty to simple assault, was adjudged to pay a fine of \$50; and the State has also offered the testimony of the clerk of this court to the effect that Fred Reyner, named in the judgment roll, is the identical and same person as F. K. Reyner, the defendant in this case. I instruct you, gentlemen of the jury, that you can only consider this judgment roll for the purpose of determining the credit to be given to the testimony of the defendant. You cannot consider this record as a circumstance from which you might infer guilt of the defendant in this case, but only as a matter affecting the credibility of F. K. Reyner as a witness in his own behalf in this case upon the witness stand."

An exception having been taken to this part of the charge, it is contended by the defendant's counsel that an error was thereby committed. For the purpose of determining the degree of credibility to which a witness is entitled, the record of a judgment may be received in evidence to show that he has been convicted of a crime: Section 852, B. & C. Comp. We think no error was committed in giving this instruction.

Exceptions were taken to other parts of the court's charge; but, believing the errors assigned are unimportant, the judgment is affirmed.

. AFFIRMED.

Argued 16 July, decided 30 August, 1907.

LEAVENGOOD v. MCGEE.

91 Pac. 453.

APPEAL—DISMISSING BECAUSE OF DEFECTIVE RECORD.

1. A suit will not be dismissed because the testimony and exhibits, or either of them, have not been transmitted to the supreme court with the rest of the record, as required by Section 553, B. & O. Comp., Subd. 1 and Rule 1 of the court, since there may be questions in the case not arising on the testimony.

EFFECT OF MOTION TO DISMISS—COMPLETING RECORD.

2. A motion to dismiss an appeal for want of specified parts of the record may be treated as a suggestion of diminution, and the court may in its discretion allow the record to be completed rather than dismiss the appeal.

CREDITOR'S SUIT—NECESSITY OF LIEN BY PLAINTIFF.

3. To enable a creditor to maintain a suit to uncover hidden assets of a debtor, he must have a judgment or an attachment on specific property.

CREDITORS' SUIT BY BANKRUPTCY TRUSTEE—BASIS OF SUIT.

4. A trustee in bankruptcy cannot maintain a suit in the nature of a creditors' bill until he has shown by the record of the referee in bankruptcy that the claims to enforce which the suit is brought have been ascertained and established in the manner provided by the bankruptcy act.

CREDITORS' SUIT—PLEADING FRAUD.

5. In pleading fraud more than a general allegation is necessary—facts must be specifically alleged showing actual fraud, or facts from which the law will construct fraud.

CONVEYANCE FRAUDULENT AGAINST SUBSEQUENT CREDITORS.

6. Constructive fraud will not support a suit by subsequent creditors to set aside conveyances, as to them the fraud must have been specific and actual.

SUFFICIENCY OF EVIDENCE.

7. The evidence in this case does not satisfactorily show the fraud claimed, and is not sufficient to support a decree for plaintiff.

WHEN CORPORATION IS DE FACTO.

8. When business which might be transacted under its articles of incorporation has actually been carried on by an organization purporting to be a corporation, such organization is a *de facto* corporation.

CORPORATION—RIGHT TO ATTACK VALIDITY OF.

9. The legality of the organization of what appears to be at least a *de facto* corporation can be questioned by the State only and in a suit brought for that purpose.

From Douglas: JAMES W. HAMILTON, Judge.

Statement by MR. COMMISSIONER SLATER.

This is a suit by C. I. Leavengood against James T. and Ruth McGee, the McGee Co. and Frances McGee, wife of one P. T. McGee. Plaintiff sues, as a trustee in bankruptcy of P. T. McGee, a bankrupt, to set aside, as fraudulent as to his cred-

itors, two deeds ultimately conveying to J. T. McGee certain lots in the Town of Myrtle Creek, Douglas County. James T. McGee and Ruth, his wife, Frances, wife of P. T. McGee, and the McGee Co., a corporation, are made defendants. The first of these deeds is alleged to have been made on November 29, 1897, by P. T. McGee and his wife, for the expressed consideration of \$2,600, to the McGee Co., which was incorporated on that date by P. T. McGee, his wife, and son Hugh, with a capital stock of \$5,000, for the purpose of carrying on a general merchandise business at Myrtle Creek. But it is alleged that no stock was subscribed or paid for; that the corporation was not organized, and for that reason had no power or authority to make or enter into a contract for the purchase of real property; that, in fact, no contract was made by and between P. T. McGee and the corporation for the purchase of real property described in the deed; but that the conveyance was voluntary, and wholly without consideration, and made with the intent and purpose of putting the title in such a condition that it could not be reached by McGee's creditors. The second deed is alleged to have been made on March 2, 1902, by the McGee Company, conveying the same property to James T. McGee, also a son of P. T. McGee, for the expressed consideration of \$1,000, when the company was in failing circumstances and unable to meet its liabilities, and was in fact insolvent; that the execution of the deed was not authorized by any acting board of the corporation, and was without consideration, and was made for the purpose of putting the property beyond the reach of the creditors of P. T. McGee and of the corporation, with the intent and for the purpose of defrauding them. It is also further alleged that since the making of this conveyance P. T. McGee has had the management and control of the property thereby conveyed to James T. McGee, and has collected the rents, and has assumed to be, and is in fact, the owner of the property; that claims amounting to about \$1,500 have been presented and allowed against the estate of P. T. McGee, and that the debts which are the basis of these claims were incurred at divers dates between

January 1, 1897, and December 1, 1904; that the assets of the estate amount to no more than the sum of \$60. A demurrer to the complaint was interposed, assigning all of the grounds allowed by statute, which being overruled, J. T. McGee answered separately, with a general denial of the complaint, and alleging affirmatively that about March 1, 1898, P. T. McGee and his wife sold and conveyed the real property mentioned in the deed, together with some store fixtures and a stock of goods, to the defendant company for the consideration of \$2,600; that the corporation held the title and the possession of the lots until December 14, 1900, when it sold and conveyed the lots to him for the sum of \$1,000, which he paid, and that his transaction with the company was in good faith, without notice or knowledge of any intended fraud by P. T. McGee or by the company upon his or its creditors. The remaining defendants answered jointly to the same effect. Plaintiff replied, denying the new matter of the separate answers. The cause was referred to a referee for the taking of testimony, and, on his report coming in and being considered by the court, findings were made in plaintiff's favor, and thereon a decree was entered, setting aside each of the deeds, and the property ordered sold and the proceeds applied to the payment of the indebtedness of P. T. McGee, as allowed in the administration of his estate as a bankrupt. From this decree all of defendants appeal. REVERSED.

ON MOTION TO DISMISS THE APPEAL.

For the motion there was an oral argument by *Mr. James Corwin Fullerton*.

Contra, there was an oral argument by *Mr. Commodore Stephen Jackson*.

Opinion by MR. COMMISSIONER SLATER.

1. At the hearing in this court a motion to dismiss the appeal was entered by plaintiff on the ground that the original testimony, and other papers in this cause, on which the decree of

the circuit court was based, had not been transmitted to the clerk of this court as required by Section 553, subd. 1, B. & C. Comp., and by Rule 1 of this court: 35 Or. 587 (37 Pac. v). Before argument thereon defendants filed a counter motion, supported by an affidavit, for an order on the county clerk of Douglas County requiring him to complete the record by forwarding all the testimony and exhibits produced at the trial in the court below. A transcript in this case was filed in this court on June 15, 1906, which, besides the pleadings, includes copies of the findings, the decree, notice of appeal and undertaking on appeal. No question is made by plaintiff that any of the necessary steps to perfect the appeal were omitted or were not taken in the time required by law to confer jurisdiction upon this court of the cause, and the filing of such a transcript here did confer jurisdiction. The filing of the testimony was not necessary to confer jurisdiction, and its absence would not destroy that jurisdiction, for there may be questions arising upon the pleadings to be tried on appeal, as well as whether the decree is supported by the pleadings and the findings; but the absence of the testimony would prevent this court from trying the case *de novo* on the facts.

2. The plaintiff's motion, however, amounts to a suggestion of a diminution of the record, and the deficiency may be supplied on order at any time before the final disposition of the cause: B. & C. Comp. § 445. The motion, therefore, must be denied, and, the testimony having been received by the clerk since the submission of the case, it should be ordered filed.

MOTION DENIED.

ON THE MERITS.

For appellants there was a brief and an oral argument by *Mr. Commodore Stephen Jackson*.

For respondent there was a brief over the names of *C. I. Leavengood* and *Fullerton & Orcutt*, with an oral argument by *Mr. James Corwin Fullerton*.

Opinion by MR. COMMISSIONER SLATER.

3. It will not be necessary to separately consider the questions raised by the demurrer, but it will be considered and disposed of along with the merits. On behalf of defendants the contention is made that, before a creditor can maintain a suit to set aside as fraudulent a conveyance of his debtor, he must either establish his claim by judgment or acquire a lien by attachment; and such is the rule in this State: *Dawson v. Coffey*, 12 Or. 513 (8 Pac. 838); *Dawson v. Sims*, 14 Or. 561 (13 Pac. 506); *Bennett v. Minott*, 28 Or. 339 (44 Pac. 288); *Matlock v. Babb*, 31 Or. 516 (49 Pac. 873); *Fleischner v. Bank of McMinnville*, 36 Or. 553 (60 Pac. 603).

4. And they further contend that a trustee in bankruptcy, having no greater authority, is bound by the same rule, citing 30 Stat. 566, c. 541 (Section 70, subd. "e," Bankr. Act Cong. July 1, 1898: U. S. Comp. St. 1901, p. 3452), which is as follows:

"The trustee may avoid any transfer by the bankrupt of his property, which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value."

This rule that a creditor must reduce his claim to a judgment before he will be allowed to attack in a court of equity a conveyance of his debtor for fraud is based upon two reasons: (1) That the claim must be a liquidated claim, so that an equity court will not be required to stop and inquire into the validity of the claim. The object of a creditors' bill is not to ascertain or determine the amount and validity of the claim or debt, but that is the province of the law. (2) A judgment and the issuance of an execution and its return *nulla bona* is required as an evidence that all the remedies at law have been exhausted before resort is made to equity. This is the reason of the law, but there are exceptions to the general rule: Note to Section 1415,

Pomeroy, Equity. A judgment is not necessary to enable a trustee in bankruptcy to maintain a suit to set aside transfers of property by the bankrupt in fraud of creditors, since under the bankruptcy act neither the trustee nor the creditor whom he represents could obtain such a judgment: *Mueller v. Bruss*, 112 Wis. 406 (88 N. W. 229). But a method is provided by the procedure in bankruptcy whereby the claims of creditors may be legally adjudicated and before the trustee should be permitted to attack by a suit in equity the conveyance of the bankrupt he shall allege and prove by the record of the referee that such procedure has been followed and that the claims on which he bases his contention have been ascertained and established. In this case the claim of Edwin Weaver, amounting to \$97, dated January 8, 1901, is, according to the contention of plaintiff, of some importance, because of the close proximity of the date of its occurrence to the date of the deed from the McGee Company to James T. McGee. But the rightfulness of it is assailed by the defendants, who claim the note upon which the claim is based has been paid in full and \$3.72 overpaid. The claim has not been acted upon by the referee, and hence it cannot be made a basis for a suit of this character.

5. It is difficult, however, to determine from the averments of the complaint upon what particular ground of fraud plaintiff relies to avoid the deeds. It is alleged that the deed by McGee and wife to the corporation was made with the intention of putting the title beyond the reach of his creditors, and that it was in fraud of his creditors; but it is not alleged that McGee at that time had any creditors, nor that he was then in failing circumstances or insolvent, and that the property conveyed was all of the property possessed by him at that time—facts necessary to be alleged to make a case of constructive fraud. It is alleged that P. T. McGee was adjudged a bankrupt on December 1, 1904, in the District Court of the United States for the District of Oregon, and “that the debts which are the basis of said claims filed against said bankrupt estate were made and incurred at divers dates between the 1st day of January, 1897,

and the 1st day of December, 1904"; but, while that allegation may be true, it does not follow therefrom that any of the debts presented and allowed were incurred or existed on or prior to March 1, 1898, the date of the first deed. There must be alleged and proven facts out of which a constructive fraud will arise by force of law, or facts constituting actual or expressed fraud. "And the rule is that the facts upon which fraud is predicated must be specifically pleaded. A mere general averment of fraud is nothing but the averment of a conclusion, and will not suffice. It presents no issue for trial, and is bad on demurrer. Such an averment not only renders the bill or complaint demurrable, but it will not even sustain a decree": 20 Cyc. 734; *Leasure v. Forquer*, 27 Or. 334 (41 Pac. 665).

6. To avoid a deed as to future creditors, constructive fraud will not be sufficient, but express fraud is essential. "If a creditor assails a conveyance made before the debt was contracted, he must as a rule allege and prove that the conveyance was made with the intent to put the property beyond the reach of creditors with whom the grantors intended to deal upon the faith of his owning the property transferred, and that upon that faith he did contract debts which he did not intend to pay" (20 Cyc. 738), or that "the transfer was made with a view of entering into some new and hazardous business, the risk of which the grantor intended to be cast upon the parties having dealings with him in the new business. Such conveyance is fraudulent as to subsequent creditors and may be attacked by them. However, a mere expectation of future indebtedness, or even an intent to contract debts, if it be only an intent, not coupled with a purpose to convey the property in order to keep it from being reached by the creditors, will not make the deed invalid as against such future creditor": 20 Cyc. 425.

7. We do not find such averments in the complaint, nor any evidence in the record tending to prove any of such requirements. The facts which we gather from the record are about as follows: For many years prior to March 1, 1898, the date of the first deed, P. T. McGee had been engaged in a general

merchandise business at Myrtle Creek, with his son Hugh as an associate. In 1895 their store was destroyed by fire, at which time they had a stock of goods estimated in value by them at about \$20,000, all of which was destroyed. They had insurance to the amount of \$8,000; but, payment being resisted, they compromised for \$4,000 and received that amount. With this sum, to which was added \$2,000 borrowed by P. T. McGee from the State school fund upon a mortgage of his and his wife's farm, they paid all their debts and resumed business in a small way. Desiring to change the manner in which they had previously been doing their business, they incorporated the McGee Co. on November 19, 1897, with a capital of \$5,000; P. T. McGee, his wife, and son Hugh being the incorporators—the former being the main stockholder, while his wife and son had only a nominal interest. The stock of goods, store fixtures, and the lots described in the deed were turned in to the corporation in payment for his interest in the stock; and to accomplish the transfer of the lots he and his wife, on March 1, 1898, made the first deed to the corporation which is assailed. This deed was recorded on March 2, 1898. The store business was then conducted in the name of the corporation for some three or four years. On the 14th day of December, 1900, the corporation conveyed the lots by deed to James T. McGee, another son. This deed was acknowledged January 14, 1901, and was recorded January 17th following. The consideration expressed therein is the sum of \$1,000, which the grantee swears he paid the corporation in money, by having loaned to it at some time previous thereto the sum of \$200, and at another time \$400, which amounts the corporation was owing him at the date of the making of the deed, and the balance of the consideration, namely \$400, he paid the corporation at the time of receiving the deed. This testimony is corroborated by P. T. McGee, and we do not find anything in the record tending to rebut it. P. T. McGee continued to occupy the premises, living in one of the old buildings thereon, and renting and collecting and receiving the rent from the other buildings, giving the receipts,

sometimes in his own name, and at other times in the name of James T. McGee, his son. In one instance he executed a lease to another in his own name for a portion of the premises. The rents were used by P. T. McGee in making repairs and for his personal expenses; but for a short time James used and occupied a part of the premises for a blacksmith shop and built a shed or addition to one of the buildings, in which he stored for a time some farm machinery. James and his father both swear that the latter was allowed to occupy a portion of the premises, which had always been his home, and to manage and rent the remainder, and to keep the rents as an offset and exchange for the rent of the farm belonging to P. T. McGee and his wife, which James was living upon without the payment of any other rent; and it also appears that James always paid the taxes upon the property in controversy. Some time after the conveyance by the corporation to James of these lots it ceased to do business, and P. T. McGee resumed business in his own name, and it was during that time that most of the debts now claimed against him were incurred.

On the 9th day of November, 1904, he filed his voluntary petition in bankruptcy in the United States District Court of the District of Oregon. Plaintiff was appointed his trustee and qualified. Claims to the amount of about \$1,500 were presented to the referee, and most of them were allowed; but of these none were incurred prior to March 1, 1898, the date of the insolvent's deed to the corporation, and the only debts which were incurred by McGee before January 21, 1901, the date on which he acknowledged for the corporation its deed to James, are as follows: The claim of the Acme Harvesting Company for \$57, which was incurred September 29, 1900, and the claim of Edwin Weaver, dated January 3, 1901, already referred to as not having been ascertained and allowed by the referee in bankruptcy at the time of the commencement of this suit and at the time of the taking of the testimony. All the remaining claims were incurred by McGee from one to three years after the date of the corporation deed to James. It also appears

from the testimony that during all this time, and up to March 11, 1902, he owned his equity of redemption in the farm and four other lots in Myrtle Creek, which were of considerable value; for on that date he mortgaged them to Kate Miller to secure the sum of \$200. So that it does not appear from the evidence that there were any facts from which a presumption of constructive fraud could arise, nor any tending to establish express fraud by McGee, when making his deed to the corporation on March 2, 1898. So that, if the corporation was such a legal entity as to be capable of receiving and conveying title to another, plaintiff must fail, unless a case may be made of a reservation by P. T. McGee of some secret interest or title in the property in fraud of his creditors.

8. Plaintiff alleges and contends that the McGee Company was not legally organized as a corporation; that no stock was taken or subscribed, and no officers were elected; and hence, he concludes, as a corporation it could not contract for or purchase or take the title to real property, nor could it convey the title to another. But plaintiff offers in evidence a certified copy of articles of incorporation of the McGee Co., which appear to have been properly executed on November 29, 1897, and were filed with the county clerk and recorded December 5, 1897, with power therein conferred upon the corporation, among other things, to run and operate a general country merchandise store and to buy and sell real property. The offering of the certified copy of the articles of incorporation makes a *prima facie* case of the legal existence of such corporation and of its right to do the business mentioned in the articles: Laws 1905, c. 50, p. 111, § 1. P. T. McGee swears that the corporation was fully organized, with a full complement of officers, and that it conducted a general merchandise business for several years. This, taken with the fact that the corporation executed, by Hugh McGee as its president, and P. T. McGee, as its secretary, the deed conveying the premises to James, shows that it has attempted to do the business which it was authorized by its charter to do, and this established it at least as a corporation *de facto*.

9. Under these circumstances the legality of its organization cannot be inquired into in any action other than by the State: *Marsters v. Umpqua Oil Co.* 49 Or. 374 (90 Pac. 151). And it is well settled that a conveyance of property to or by a corporation *de facto* will be binding and valid as against all parties except the state: *Finch v. Ullman*, 105 Mo. 255 (16 S. W. 863: 24 Am. St. Rep. 383).

The corporation, then, having taken the title to the lots in question by the deed to P. T. McGee and wife, executed on March 1, 1898, free from any fraud of the grantor, its title would not be affected by any of his subsequent creditors, unless the conveyance is made with the intent to defraud future creditors; but, as we have already seen, there is no averment in the complaint that P. T. McGee, when he and his wife made the conveyance, intended to deal with these creditors in the future and to incur these subsequent debts on the faith of his ownership of the property in question, nor is there any proof to that effect; nor is there any averment that when the conveyance was made he was about to engage in a hazardous enterprise, and that it was made so as to throw the burden of loss on his anticipated creditors, but the proof shows that, by conveying the property to the corporation and the business being thereafter conducted in the name of the corporation, the property was exposed to all the hazards of the business of the corporation, and hence it could not have been that such fraud was intended. The evidence, we think, shows quite clearly that, when James T. McGee took the title from the corporation by its conveyance, he paid the consideration expressed in the deed, and that there was no secret reservation of any interest therein by P. T. McGee. The explanation of the subsequent possession of the premises by P. T. McGee is sufficient to satisfactorily rebut any possible inference that might otherwise arise from such facts that P. T. McGee had retained a secret interest in the property.

For these reasons, it follows that the decree should be reversed, and one entered here dismissing the complaint.

MOTION DENIED: REVERSED.

Argued 6 February, decided 26 March, 1907.

CHUNG v. STEPHENSON.

89 Pac. 386.

PLEADING—OBJECTIONS—WAIVER.

1. Where a reply treated claims set up by defendant as counterclaims, and they were so regarded on the trial, though they were defectively pleaded, they should have been treated as issues, and findings made thereon.

SET-OFF AND COUNTERCLAIM—CLAIMS SUBJECT TO COUNTERCLAIM.

2. Where a lessee of a hopyard sold his interest in the crop to the lessor and assigned his claim for the purchase money, the assignee took it subject to all counterclaims held by the lessor for advances made pursuant to the lease.

LANDLORD AND TENANT—ADVANCES—ACTION—ISSUES.

3. Where the lessee of a hopyard under a lease, whereby the lessor was to have a certain portion of the crop, assigned his interest, on an issue between the assignee and the lessor as to the lessee's liability for advancements, any question as to whether another was a joint owner or partner with the lessee was immaterial.

APPEAL AND ERROR—PRESENTATION OF QUESTION BELOW—EXCEPTIONS—FAILURE TO MAKE FINDINGS.

4. Section 173, B. & O. Comp., provides that no exception need be taken or allowed to any decision on a matter of law when the same is entered in the journal, or made wholly on matters in writing or on file in the court. *Held*, that under the statute, and as findings in law actions are entered in the journal, the failure of the trial court to find on a counterclaim may be reviewed on appeal, though no exception was taken to such failure to find.

From Multnomah: JOHN B. CLELAND, Judge.

Statement by MR. JUSTICE EAKIN.

This is an action to recover money, to which defendants counterclaimed. From judgment for plaintiff, defendants appeal. Don Sing had a lease of the hopyard of defendants, paying one-third of the crop as rental. The defendants were to advance supplies to aid him in the cropping, the hops were to remain their property until sold, and defendants were to retain out of the price of the hops such sum as would compensate them for such advances. In June, 1904, Don needed money to aid him in caring for the hops, and defendants not having it to spare, authorized him to borrow \$150 from plaintiff, and jointly signed a note with him to plaintiff therefor. At the same time defendants gave to plaintiff a duebill for \$150 for a former loan he had made to Don, specifying therein that the same was to be paid out of the price of the hops when sold. Plaintiff alleges that on October 27, 1904, Don and Gee He sold to

defendants their two-thirds interest in the hops raised that year at 29½ cents per pound, and thereafter assigned their claim therefor against defendants to plaintiff, and he seeks to recover on these three items—the note, the duebill and the price of the hops—giving credit for a \$250 payment on the latter. Defendants deny the purchase of the hops, plead a tender of \$158.50 Payment of the note, allege as a defense an account for advances of \$1,093.69 (\$1,041.44 of which is admitted), aver that at his request they paid \$71.70 as premium for insurance on his interest in the hops, and, as a separate defense, claim damages in the sum of \$2,750 for injury to the hop plants due to the negligent cultivation thereof. All these matters of defense are denied by the reply. The only exceptions taken at the trial were to the findings. REVERSED.

For appellant there was a brief and an oral argument by *Mr. John M. Long.*

For respondent there was a brief and an oral argument by *Mr. George E. Chamberlain.*

MR. JUSTICE EAKIN delivered the opinion of the court.

1. These two items, the claim for damages for injury to the hop plants and for the insurance premium paid, are very defectively pleaded, but the reply treats them as counterclaims, and they were so regarded at the trial; therefore, unless otherwise disposed of in that court, they are issues made by the pleadings, and the court should have made findings on such issues: *Daly v. Larsen*, 29 Or. 535 (46 Pac. 143).

2. Defendants admit their liability upon the note for principal and interest, and tendered the amount thereof into court. This constitutes payment, and it is clear that they are entitled to be reimbursed therefor out of the price of the hops. It is a counterclaim which defendants were entitled to plead as against Don Sing; for it was clearly understood between them that the signing of the note was a part of the advances to Don provided for in the contract, and plaintiff took the claim subject to every counterclaim held by defendants at the time of the purchase. The amount tendered into court is a payment on the

judgment to that extent, but only against that portion of the judgment based on the note. Thus defendants are not reimbursed out of the price of the hops for the amount paid on the note. The court should have deducted from the price of the hops the amount of this note.

The item of \$50 claimed by defendants as payment appears from the evidence to be part of the \$250 payment credited in the complaint. The lower court finds the fact correctly as to the \$150 duebill, that it is to be paid out of the hops, and, as plaintiff owns the duebill and the claim for the price of the hops, it is proper to ignore it in the judgment, as defendants are not entitled to deduct it from the price of the hops, unless it has been paid by them.

3. Whether Gee He was a joint owner or partner with Don Sing in the crop of 1904 is immaterial. It could only be a question between themselves, and could not affect Don Sing's liability to defendants for advances under the lease.

For the errors here suggested, the cause will be reversed, and remanded to the court below for such further proceedings as may be deemed proper, not inconsistent with this opinion.

REVERSED.

Decided 23 April, 1907.

ON MOTION FOR REHEARING.

80 Pac. 805.

MR. JUSTICE EAKIN delivered the opinion of the court.

4. It is claimed by this motion that the failure of the lower court to find upon the defendants' counterclaim for damages was not excepted to in the lower court, and cannot be reviewed here, although assigned as error. This question was not suggested at the argument, but the findings in law actions are entered in the journal, and, with the pleadings, is part of the judgment roll; and, if any error of the court below is disclosed therefrom, it may be relied upon in this court without an exception thereto. Section 172, B. & C. Comp., provides that "no exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal, or made

wholly upon matters in writing and on file in the court." In *Mitchell v. Powers*, 16 Or. 487, 492 (19 Pac. 647, 649), it is held: "Because an exception need not be taken or allowed to any decision upon a matter of law, when the same is entered in the journal, or made wholly upon the matters in writing, and on file in the court, does not preclude the necessity of making a statement of the exception. In such case an exception to the decision is deemed to have been taken. The law regards it as having been objected to, which constitutes an exception; but that is a mere challenge to the correctness of the decision. Whether it is erroneous or not depends upon facts. It is often necessary to show the circumstances under which it was made in order to prove it to be erroneous." This decision is quoted in *Farrell v. Oregon Gold Co.* 31 Or. 463, 473 (49 Pac. 876). And in *Moody v. Richards*, 29 Or. 282, 285 (45 Pac. 777), Mr. Justice MOORE, discussing this question, after quoting Thompson on Trials, to the effect that such a finding of facts is in the nature of a special verdict and is interpreted and its sufficiency is determined by the same rule, says: "The statute making it incumbent upon the court to state the facts found, the consent of a party to submit his cause for trial without the intervention of a jury must be construed as a request for a special verdict, which necessitates a finding upon all the material issues involved in the action." We understand that exceptions are only necessary to be taken to save and bring up errors transpiring upon the trial that cannot be preserved in the record without a bill of exceptions. This error appears from the record, viz., the pleadings and the findings, and does not depend upon the bill of exceptions to disclose it. It is said in *Drainage District v. Crow*, 20 Or. 535, 537 (26 Pac. 845, 846):

"If questions arise upon the trial and exceptions are taken, and the findings, either of law or fact, cannot properly show what rulings the court made thereon, the same can only be reviewed on bill of exceptions as in an ordinary jury trial."

Also, there must be findings of fact sufficient to sustain the judgment. The rule is well settled that all material issues must

be passed upon: *Fink v. Canyon Road Co.* 5 Or. 301, 310. It is said in *Drainage District v. Crow*, 20 Or. 535, 537 (26 Pac. 845): "Where a cause is tried by the court without the intervention of a jury, there must be findings of fact sufficient to sustain the judgment. All the material issues should be passed upon. * * In *Dowd v. Clarke*, 51 Cal. 262, it was held that a judgment could not stand unless there were full findings which respond to all the material issues made by the pleadings." In that case there was no bill of exceptions, and hence no exceptions, and the cause was reversed because the findings did not support the judgment. In *Pengra v. Wheeler*, 24 Or. 532, 538 (34 Pac. 354; 21 L. R. A. 726), where the omission of the court to find upon a counterclaim for damages was assigned as error, *Drainage District v. Crow* was cited with approval, and Mr. Justice MOORE says: "The law is well settled in this State that, when a cause is tried by the court without the intervention of a jury, there must be findings of fact upon all the material issues presented by the pleadings. There being no finding upon this issue, it must be presumed that it escaped the attention of the court." Both of these cases are cited with approval in *Jameson v. Coldwell*, 25 Or. 199, 205 (35 Pac. 245). To the same effect are *Breding v. Williams*, 33 Or. 393 (54 Pac. 206); *Lewis v. Bank*, 46 Or. 187 (78 Pac. 990). Therefore, we conclude that the question was properly before this court.

The question of defendants' claim for insurance money was specially alleged as an item of counterclaim. This was denied, evidence taken thereon, and a special request for a finding, and is not included even by inference in any finding.

As to the counterclaim for credit for the amount of the note, \$158.50, as between Don Sing and the Stephensons, Don would owe them this amount when the Stephensons paid it; and it was to come out of the hops. It is not a question whether Louie was a party to that arrangement. Louie could not deal with Don in relation to the hops without inquiry as to the Stephensons' interest therein. The Stephensons had possession of the hops by the terms of their lease to indemnify them against

advances, and the indorsement of the note was an advance, and Louie cannot claim to be an innocent purchaser. The note was a separate obligation as to Louie, but was a charge upon the hops. It is hardly correct to say that the deposit of the amount of this note is credited upon the judgment. It is credited against the judgment for the amount of the note, \$158.50, but there is also judgment for the full amount of the hops, \$2,167.46, and this leaves defendants without indemnity for the amount thus paid on the note.

The motion is denied. REVERSED: REHEARING DENIED.

Argued 10 October, decided 19 December, 1907.

SUMMERS v. GEER.

85 Pac. 513, 98 Pac. 123.

APPEAL—NOTICE—SUFFICIENCY—JUDGMENT—SURPLUSAGE.

1. A reference in a notice of appeal from a judgment to the entry of the judgment in the "judgment docket," while Section 196, B. & O. Comp., requires the recording of judgments in the journal, which is, by section 588, a book in which the clerk must enter the proceedings of the court in term time, is a misdescription of the record intended, and may be disregarded as surplusage in determining the sufficiency of the notice.

SAME—DESCRIPTION OF PARTY—SUFFICIENCY.

2. A defect in a notice of appeal, arising from the failure to state that the person named in the notice as appealing is the defeated party in the action, is not fatal, identity of the person being established under Section 788, subd. 25, B. & O. Comp., from the identity of name.

SAME—REQUISITES OF NOTICE.

3. A notice of appeal from a judgment containing the name of the court and the parties, and reciting that the defeated party appeals from a judgment rendered and "entered of record in the above-entitled court, * * * wherein and whereby it was ordered and adjudged substantially as follows," followed by the judgment appealed from, is sufficient under Section 549, B. & O. Comp., providing that a notice of appeal shall be sufficient if it contains the title of the cause, the name of the parties, and notifies the adverse party that an appeal is taken from the judgment, though the omission from the notice of the words "and cause" after the phrase "in the above-entitled court," creates a doubt as to whether the judgment complained of was rendered in the case at bar, and though the word "substantially" qualifying the words "ordered and adjudged" makes uncertain what purports to be the judgment attempted to be reviewed.

PUBLIC LANDS—DISPOSAL—OFFICES OF COMMISSIONER AND AGENT.

4. The Governor was made land commissioner in 1878, by Hill's Ann. Laws 1892, section 3595, with power to locate all lands to which the State was entitled. Subsequently, by Act February 18, 1899 (Laws 1899, p. 156), which repealed section 3597 and its amendments of 1895 (Laws 1895, p. 7) and 1899 (Laws 1899, p. 94),

providing for an agent's appointment and fixing his duties, the Governor was made land commissioner, with authority to appoint such agents as might be necessary in the performance of his duties, the agents thus having no specified duties other than to aid the commissioner in locating the lands. *Held*, that the commissioner and agents were not agents of the State for the sale of state lands, and, in an action against them for defrauding a person desiring to buy state lands, allegations that they neglected to prepare and keep for public use a list of base land, and that they refused to receive applications for the purchase of indemnity land, etc., are immaterial, since those matters were not within their duties.

AUTHORITY TO SELL LAND—SELLING LIEU LAND NOT YET SELECTED.

5. Hill's Ann. Laws 1892, section 3597, as amended in 1895 (Laws 1895, p. 7), makes it a duty of the State Land Board to proceed immediately to select lieu lands and perfect title thereto in the State, and keep a list of such as are for sale, etc. Section 3296, B. & O. Comp. (amendment of 1899), provides that applications to purchase state lands can be made only to the State Land Board by filing the application with its clerk. Hill's Ann. Laws 1892, section 3619, authorizing a prospective purchaser to ascertain lands lost to the State, and have the land board select other lands desired by him in lieu thereof, was repealed in 1895, since which time the law has not contemplated sales of indemnity lands or applications for their purchase until they have been selected and title perfected in the State. *Held*, that the land agent or board has no authority to make contracts for the State to sell lieu land not yet selected and to which title has not been perfected, and, if it were optional with the state land agent or board to select such lieu land as a prospective purchaser suggests, upon base to be established by the purchaser, board or agent, the approval by the United States Land Department of the selection would be at the applicant's risk.

FRAUD—ACTION—COMPLAINT—SUFFICIENCY.

6. In an action for fraud against a state land commissioner and agents, a count of a complaint which alleges that plaintiff was led by two of the defendants to buy information of the other that certain school sections lost to the State were mineral in character, when, in fact, they were not mineral in character, and the information was false, and that having selected lieu land thereon, his application was not approved by the United States Land Department, but does not allege that the defendants by whom he was induced to purchase the information, knew the kind of information possessed by the one selling it, nor in any way became liable as guarantors of or parties to the representations made him, does not state a cause of action against them.

PLEADING—DUPLICITY.

7. A count of a complaint in an action for fraud alleged that one of the defendants, a state land agent, with intent to defraud plaintiff, falsely represented himself to be in possession of private records and information as to mineral lands for which the State was entitled to indemnity selections, which information he offered to sell to plaintiff, and pretended that for a certain sum he would furnish to the other land agent for plaintiff's information as to the whereabouts of certain available mineral base land for which indemnity lands were due the State, and which would be approved by the Land Department and Secretary of the Interior, all of which was done with knowledge of its falsity, and that he thereby fraudulently obtained plaintiff's money. *Held*, that, though the terms of a contract are set up as constituting part of the means by which the fraud was consummated, the count was not duplicitous, since recovery was sought only upon the fraud and deceit, while to render a pleading duplicitous it must appear that two or more causes of action are relied upon for a single recovery.

From Marion: GEORGE H. BURNETT, Judge.

Action by George Summers against T. T. Geer, L. B. Geer and W. H. Odell, to recover money obtained from plaintiff by fraud and deceit. From a judgment for defendants, plaintiff appeals.

A motion to dismiss the appeal was denied.

MOTION OVERRULED: AFFIRMED AS TO T. T. GEER AND L. B. GEER: REVERSED AND REMANDED AS TO W. H. ODELL.

Decided 29 May, 1906.

ON MOTION TO DISMISS THE APPEAL.

86 Pac. 512.

Mr. George G. Bingham and *Mr. John W. Reynolds*, for the motion.

Mr. Myron E. Pogue, contra.

PER CURIAM: This is a motion to dismiss an appeal. The notice of appeal, by referring to the first page of the transcript for the title and names of the parties, is as follows:

"In the Circuit Court of the State of Oregon for the County of Marion. Department No. 1. George Summers, Plaintiff, v. T. T. Geer, L. B. Geer, and W. H. Odell, Defendants. To T. T. Geer and to George G. Bingham, Your Attorney of Record, and to L. B. Geer and to George G. Bingham, Your Attorney, and to W. H. Odell and to A. O. Condit and John W. Reynolds, Your Attorneys of Record, in the Above-Entitled Action: You and each of you are hereby notified, and you will hereby please take notice that the plaintiff, George Summers, hereby appeals to the Supreme Court of the State of Oregon from that certain judgment made, rendered and entered of record in the above-entitled court on the 10th day of July, 1905, at page 405, of Book 24, Judgment Docket for Marion County, Or., wherein and whereby it was ordered and adjudged substantially as follows:

'Now on this 10th day of July, 1905, this cause coming on to be heard, plaintiff appearing by M. E. Pogue, his attorney, and the defendant T. T. Geer appearing by George G. Bingham, his attorney, and the defendant L. B. Geer appearing by George G. Bingham, his attorney, and the defendant W. H. Odell appearing by A. O. Condit and John W. Reynolds, his attorneys, and now at this time the plaintiff, by M. E. Pogue, his attorney, announcing to the court that he did not desire to

file a second amended complaint, and that he was satisfied with and could stand on his first amended complaint, and the defendants by their attorneys now move the court for a judgment of dismissal for the failure on the part of plaintiff to file a second amended complaint, and it appearing to the court that the defendants' motion should be allowed, it is therefore ordered and adjudged that plaintiff's action be, and the same is, hereby dismissed, and that the defendants each recover of and from the plaintiff their costs and disbursements herein expended and taxed and allowed at \$46.00'—and from the whole and every part of said judgment. M. E. Pogue, Attorney for Plaintiff."

1. When the notice of appeal is not given in open court, its adequacy is tested by the following rule: "Such notice shall be sufficient if it contains the title of the cause, the names of the parties, and notifies the adverse party or his attorney that an appeal is taken to the supreme or circuit court, as the case may be, from the judgment, order, or decree, or some specified part thereof": Section 549, B. & C. Comp. As all judgments of the circuit court are required to be recorded in the journal (Id. Section 196), which is a book in which the clerk must enter the proceedings of the court in term time (Id. Section 583), the reference in the notice of appeal to the entry of the judgment in the "Judgment Docket" is probably a misdescription of the record intended and all allusion to it may be disregarded as surplusage.

2. It is not stated that the George Summers mentioned in the notice of appeal is the plaintiff in this action. This defect is not fatal for certainty to a common intent in general (5 Am. & Eng. Enc. Law, 2 ed., 799) is the degree of indubitableness required which permits invoking the presumption, that the identity of a person may be established from the identity of name; Section 788, subd. 25, B. & C. Comp.

3. The omission from the notice of the words "and cause" after the phrase "in the above-entitled court" creates a doubt as to whether the judgment complained of was rendered in the case at bar. So, too, the word "substantially," used to qualify the verbs "ordered" and "adjudged," makes uncertain what purports to be the judgment attempted to be reviewed, although

the language employed is designated by quotation marks. "The punctuation of an instrument," says Mr. Tiffany (17 Am. & Eng. Enc. Law, 2 ed., 20), "may be considered when the meaning is doubtful." By rejecting the repugnant words mentioned and applying the rules of construction specified, the notice of appeal assailed comes within the very liberal provisions of the statute regulating its sufficiency.

The motion should therefore be denied, and it is so ordered.

MOTION OVERRULED.

Decided 17 December, 1907.

ON THE MERITS.

98 Pac. 183.

For appellant there was a brief and an oral argument by *Mr. Myron E. Pogue*.

For respondent there was a brief over the names of *Mr. George G. Bingham*, *Mr. John W. Reynolds* and *Mr. Alva O. Condit*, with oral arguments by *Mr. Bingham* and *Mr. Reynolds*.

Statement by MR. JUSTICE EAKIN.

This suit is brought to recover as damages money obtained from plaintiff by conspiracy and fraud. The complaint consists of 340 pages, and is even too lengthy to include the first count in this statement. It will be sufficient to state generally the ground of plaintiff's claim. From January, 1899, to January, 1903, defendant T. T. Geer was Governor and *ex officio* land commissioner of the State of Oregon, and defendants L. B. Geer and W. H. Odell were state land agents, appointed by the Governor. During that time, especially in 1902, defendants conspired for the purpose of defrauding all persons desiring to purchase indemnity lands from the State by withholding information from them as to the State's rights to indemnity lands in lieu of sections 16 and 36, lost to the State by the creation of forest and Indian reserves, adjustment of State boundaries, and survey of non-navigable lakes, of which there were 82,000 acres, called "lieu land" base. Defendants announced to the public that the State had exhausted its supply of such base lands, and, for the purpose of aiding defendant W. H. Odell

in the sale of information of such sections lost to the State by reason of their mineral character, called "mineral" base, it was the custom of the said T. T. and L. B. Geer to require applicants for the purchase of indemnity lands to furnish base at their own expense, and to refer them to W. H. Odell for information as to such base, to refuse applications for the purchase of lieu land, except through W. H. Odell, and to refuse to give information to applicants as to non-mineral base—all alleged to have been done pursuant to such conspiracy and for the purpose of aiding W. H. Odell to sell such information as to pretended mineral base, and with knowledge of the facts, that T. T. and L. B. Geer failed to prepare and keep for public use a list of such base lands, for which indemnity is due the State. The said L. B. Geer was accustomed to receive the applications to purchase, and collect from such applicants the first payment of the purchase money, and also the compensation to W. H. Odell for such information prior to the selection of said lieu lands, and hold and retain the same until the indemnity lists were furnished the United States Land Office, and when approved by the local land officers to file such applications with the clerk, and cause certificates of sale to issue thereon to such purchaser before such selections were approved by the General Land Office. The allegations of the complaint relating to the conspiracy on the part of T. T. and L. B. Geer were alleged at great length and with particularity. The complaint further states that, pursuant to such conspiracy, W. H. Odell fraudulently represented to the plaintiff that he had information and knowledge of 320 acres of mineral base which he would furnish to plaintiff for \$480, and that by reason of the acts and representations of defendants, and relying upon the same and believing them to be true, plaintiff paid to said defendant W. H. Odell the said sum of \$480 for such information of alleged mineral base, viz., the east half of section 16, township 14 south, range 31 east, W. M., and, based thereon, plaintiff applied to said L. B. Geer for the purchase of 320 acres in section 32, township 11 south, range 14 east, W. M., from the State as lieu land, and said L. B. Geer procured from the clerk a certifi-

cate of sale therefor in favor of plaintiff; that plaintiff was ignorant of the fact that W. H. Odell was an agent of the State; that said base, so furnished by W. H. Odell was not mineral in character, and had not been lost to the State, and could not be used as base for the purchase of lieu lands; and plaintiff's application was rejected, and the certificate issued to him canceled. Plaintiff claims damages in the sum of \$480, with interest, and punitive damages in the sum of \$1,000. There are 25 other counts in the complaint, all based upon the same allegations as the first, except that they are upon claims in favor of other persons and assigned to plaintiff. Motions were filed to strike out all the allegations which alleged any acts of defendants T. T. and L. B. Geer tending to show their custom with, or representations to, the public, the greater portion of which were sustained. A general demurrer to the complaint was filed by the defendant W. H. Odell on the ground that several causes of action have been improperly united, and that it does not state facts sufficient to constitute a cause of action, also by the defendants T. T. and L. B. Geer, for the reason that it does not state facts sufficient to constitute a cause of action against them, which were sustained by the court, judgment being rendered thereon dismissing the action.

REVERSED AND REMANDED.

MR. JUSTICE EAKIN, after stating the facts in the foregoing terms, delivered the opinion of the court.

4. It becomes necessary to notice the provisions of the statute as to the power and duties of the Land Commissioner and Land Agent. The Governor was first made Land Commissioner in 1878, with power to locate all lands to which the State was entitled (Hill's Ann. Laws 1892, § 3595), and by Section 3597 he was authorized to appoint an agent to select State lands; this latter section was amended in 1895 by giving more specific directions as to the powers and duties of such Land Agent, and also requiring the State Land Board to ascertain all the losses sustained by the State by reason of the occupation of the sixteenth and thirty-sixth sections and to select lieu land therefor,

and "that a list of such lands so selected be kept in a book accessible to every one, in the clerk's office * * accurately describing the lands for sale and the land for which it was taken in lieu"; this section is a part of Chapter 52 of Hill's Ann. Laws of Oregon, 1892, and was again amended by the legislature in 1899 with additional duties upon the State Land Agent as to such lieu lands and giving to him general supervision of all lands acquired by the State by foreclosure of mortgages, etc.; this amendment was approved and became a law February 17, 1899. Laws 1899, p. 94. At the same term of the legislature a new act was passed relating to the selection and sale of State lands, which was approved by the Governor and became a law on February 18, 1899 (Laws 1899, p. 156), expressly repealing Chapter 52, of which Section 3597 was a part; this act of February 18, 1899, appointed the Governor as Land Commissioner, and empowers him "to locate the lands to which the State of Oregon is entitled," and he "is authorized to appoint such agent or agents as may be necessary in the performance of his duties."

Applications to purchase State lands can be made only to the State Land Board, and must be filed with the clerk of the Board, and the purchase price paid to him, but since February 18, 1899, until February, 1907, the State Land Agent has had no specified duties other than to aid the Commissioner in locating the lands to which the State is entitled. Therefore the allegations in the complaint that the defendants T. T. and L. B. Geer neglected to prepare or file, and keep for public use, a list of such base land, and that they refused to receive applications for the purchase of indemnity lands, or required applicants to furnish base at their own expense, and other matters with reference to certain customs and usages of defendants, are wholly immaterial, as these matters were not within their duties or province; they were not agents of the State for the sale of State lands.

5. Section 3597, Hill's Ann. Laws 1892, as amended in 1895 (Laws 1895, p. 7), made it a duty of the State Land Board

to proceed immediately to select such lieu lands, and perfect title thereto in the State, and keep a list of such that are for sale, together with the base upon which the selection is made. This, however, was to be a list of selections to which title had been perfected and of the lands for sale. By Section 3296, B. & C. Comp. (amendment of 1899), applications to purchase State lands can be made only to the State Land Board by filing the same with the clerk of the Board. It is alleged that T. T. and L. B. Geer directed and advised the clerk of the State Land Board to refer all applicants for lieu lands to L. B. Geer; but the clerk was not the clerk of the Governor or agent, and they had no control or authority over him. The burden of plaintiff's allegations upon the matter of the fraud of T. T. and L. B. Geer is, that it was their custom and usage to represent to the public and plaintiff that there was no available non-mineral base and to refer all applicants to W. H. Odell for information as to mineral base, and that plaintiff, having knowledge of this custom, applied to W. H. Odell for such information to his damage.

In 1902 there was no law authorizing a prospective purchaser to ascertain lands lost to the State, and based thereon have the Board select other lands desired by him in lieu thereof. The act of 1887 (Hill's Ann. Laws 1892, § 3619) did authorize such a proceeding, but this was repealed by the act of 1895 (Laws of 1895, p. 7), since which time the law has not contemplated sales of indemnity lands or applications for their purchase until the same have been selected and title thereto perfected in the State. It was not within the power or authority of the Agent or Board to make contracts for the State to sell lieu lands not yet selected and to which the State had not perfected title. It may have been optional with the State Land Agent or Board to select such lieu land as some prospective purchaser might suggest upon base to be established by such purchaser, board, or agent; but such was not made their duty, and the approval by the United States Land Department of such selections would be at the risk of such applicant.

50 OR.—17

6. Much that is alleged as against T. T. and L. B. Geer is immaterial by reason of the terms of these statutes. Plaintiff seeks to recover, not because he was induced or compelled to pay for information as to available base, but because of the fraud by which he was led to buy information that certain school sections were mineral, when, in fact, such information was false, and such lands were not mineral in character, and because of his consequent loss of the money paid therefor and failure to secure lieu land thereon. It is not alleged as against T. T. and L. B. Geer that they knew the kind of information possessed by W. H. Odell as to the mineral character of the land, or that they represented that the land was mineral, or in any way made themselves liable as guarantors or parties to the representations of W. H. Odell. Therefore the complaint is insufficient to create a liability as against T. T. and L. B. Geer; and the demurrer was properly sustained.

7. As to the sufficiency of the complaint as against W. H. Odell, it is alleged that, with intent to defraud plaintiff, he falsely represented himself to be in the possession of private records and information as to the whereabouts of large tracts of mineral lands, for which the State of Oregon was entitled to indemnity selections, which information he offered to sell to the plaintiff; and that he falsely represented and pretended to plaintiff that for the sum of \$480 he would furnish for plaintiff to L. B. Geer, State Land Agent, information as to the whereabouts of 320 acres of available mineral base land, and that such lands were mineral in character and valid base, for which indemnity lands were due the State of Oregon, and would be approved by the Land Department and Secretary of the Interior, all of which, it is alleged, was done with knowledge of its falsity, and that he thereby fraudulently obtained plaintiff's money.

It is claimed that this was objectionable for duplicity in alleging upon breach of contract and upon fraud and deceit. To constitute duplicity in pleading, it is not enough that it appears therefrom that the plaintiff has more than one cause

of action. It must appear that he relies on more than one as the ground of a single recovery. It is not objectionable because he sets up the terms of a contract as constituting part of the means by which the fraud was consummated, so long as he does not seek to recover upon it: *Bingham v. Lipman*, 40 Or. 363 (67 Pac. 98); *Raymond v. Sturgis*, 23 Conn. 134. But we think the complaint clearly shows that the plaintiff is relying upon the fraud and deceit, and not upon a breach of contract. We understand the rule to be that a pleading is duplicitous only when it so alleges both the contract and deceit that, upon the trial, one recovery may be had upon either the contract or the deceit; but the complaint here plainly discloses that the recovery is sought only for the deceit, and states a good cause of action against W. H. Odell, and his demurrer was improperly sustained.

The judgment, therefore, will be sustained as to T. T. and L. B. Geer, and reversed as to W. H. Odell, and remanded to the lower court for such further proceedings as may be proper and not inconsistent with this opinion.

REVERSED AND REMANDED.

Argued 6 May, decided 25 June, 1907.

MONTGOMERY v. SOMERS.

90 Pac. 674.

EVIDENCE—DAMAGES—CONCLUSION OF WITNESS.

1. Though a witness may state the facts upon which an alleged damage is predicated, he should not be allowed to give his opinion as to the amount of damages resulting from a given act, that being for the jury to determine.

SAME—HARMLESS ERROR.

2. Error in an action for trespass to land, in allowing a witness to give his opinion as to the amount of damages resulting from the trespass, was harmless, it appearing that the incompetent testimony did not influence the verdict.

SAME—PRESUMPTION THAT TESTIMONY WILL SUPPORT VERDICT.

3. Where, in an action for damage to a growing hay crop by trespass, defendant's bill of exceptions to the ruling admitting testimony as to the value of the crop did not contain all the evidence, and there was no statement that testimony was not offered to show how many tons of hay the crop would have made, had it not been injured, or the cost of harvesting, it must be presumed that there was such testimony introduced sufficient to support the verdict.

DEDICATION—HIGHWAYS—PUBLIC LANDS—ACT OF CONGRESS CONSTRUED.

4. Section 2477, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1567], granting a right of way for highways over public lands not reserved for public uses, is an express dedication of a right of way, and an acceptance of the grant while the land is a part of the public domain may be effected by public user alone, without any action of the public highway authorities, and, when an acceptance thereof has once been made, the highway is legally established, and is thereafter a public easement upon the land, and subsequent entrymen and claimants take subject to such easement.

TRESPASS—TRIAL—INSTRUCTIONS.

5. Where, in trespass to land, defendants relied upon its user for several years as a highway while the land was public domain, an instruction that by United States statute a right of way for highways is granted over public lands, and long-continued user by the public is "sufficient" to establish an acceptance of the grant, was not objectionable as declaring long-continued user "essential" to the establishment of the highway.

INSTRUCTION—TRAIL OR DEFINITE PATH A PUBLIC HIGHWAY.

6. An instruction in trespass that if, while the land over which a trail lies was public land, the public "for a long period, viz., ten years or more," used as a public highway a definite path, it thereby became a public highway, was not objectionable as declaring such user necessary to the establishment of a highway.

HIGHWAYS—PRESCRIPTIVE RIGHT—WIDTH.

7. Where the right to a highway depends solely upon user by the public, its width is measured by the extent of the user; but the public will not be confined to the track made by vehicles, etc. And, on the other hand, the public cannot acquire a prescriptive right to pass over land generally; but the user must be by way of a certain well-defined line of travel, not including, however, all the land over which loose stock being driven travel promiscuously, though in a generally uniform direction.

SAME—NOT REVERSIBLE ERROR TO INSTRUCT.

8. Though the extent of user and reasonable width of a highway claimed by the public is generally for the jury, where defendants justified a trespass to land on user for several years by drovers, etc., as a highway, while it was public domain, in view of Section 4790, B. & O. Comp. (Laws 1908, p. 267), providing that all county roads shall be 60 feet wide, etc., it was not reversible error to instruct that, if the trail was a legal highway, it must be considered of reasonable width for the convenient use of the public, not exceeding 60 feet.

From Wallowa: ROBERT EAKIN, Judge.

Action by William Montgomery against E. P. Somers for trespass.

From a judgment in favor of plaintiff, defendant appeals.

AFFIRMED.

Statement by MR. COMMISSIONER SLATER.

On February 2, 1906, plaintiff and his lessor settled upon, and entered as homesteads, under the laws of the United States, adjoining tracts of land lying in the eastern part of Wallowa County, in a deep and precipitous canyon on the Im-

naha River. From the year 1896, and prior to plaintiff's entry and settlement, stockmen and the public generally had been traveling up and down this canyon driving herds of cattle, horses, and sheep to and from the grazing territory, by which travel trails had been made along the borders of this river and across the small level places or river bottoms in the canyon. These settlers were engaged in raising stock, and by means of a few acres of tillable land were enabled to raise a few tons of hay to sustain their stock through a stress in winter. In May, 1906, plaintiff had fenced in and under cultivation and sown to grain for hay, two or three of these flats or bottoms, including some land he had leased, in all about 11 acres, besides some land upon the hillside was inclosed to save the grass for winter pasturage. In fencing his land, plaintiff left a passageway, 16 to 20 feet wide, along the bank of the stream for a way for the public. On the 20th of May, 1906, defendant's servants and employes were driving 2,000 head of his sheep along this canyon, and on coming to plaintiff's premises the sheep refused to go along the roadway left by plaintiff for passage, and some of them broke through into his inclosure, and those in charge of them drove all of the sheep through and across plaintiff's inclosures, destroying a portion at least of his crop, for which plaintiff brought this action in trespass, demanding damages to the amount of \$150. The defendant answered, denying all of the complaint, excepting he admitted that he was the owner of the sheep which did the damage, and by an affirmative answer he claimed that, long prior to the plaintiff's settlement on the land, a legal highway had been located and established and existed at, over, and across the inclosed premises where the sheep had been driven, and that plaintiff in fencing the land had unlawfully closed up the highway. The reply put at issue these affirmative allegations of the answer. During the course of the trial, the court permitted the plaintiff to testify, over defendant's objections, that the aggregate amount of damages to him, caused by defendant's alleged trespass, was at least \$150, and that he could not possibly replace the amount

cf hay destroyed for less than that amount; and also permitted one George Houser likewise to testify, over defendant's objections, that plaintiff was damaged \$200 or \$300. This verdict was for plaintiff in the sum of \$65, on which judgment was entered, from which defendant appeals, assigning as errors the admission of the testimony mentioned, besides objections to the court's instruction.

For appellant there was a brief and an oral argument by *Mr. D. W. Sheahan*.

For respondent there was a brief and an oral argument by *Mr. J. A. Burleigh*.

Opinion by MR. COMMISSIONER SLATER.

1. It is unquestionably the settled law of this State that in actions of this character, while a witness may state the facts upon which the damage is predicated, he cannot give his opinion as to the amount of the damages resulting from a given act, because it is the exclusive provinces of the jury to ascertain from the facts given in evidence the amount of damages, under the rules of law given to them by the court: *Burton v. Severance*, 22 Or. 91 (29 Pac. 200); *Chan Sing v. Portland*, 37 Or. 68 (60 Pac. 718); *United States v. McCann*, 40 Or. 13 (66 Pac. 274); *Pacific Live Stock Co. v. Murray*, 45 Or. 103 (76 Pac. 1079). For this reason the court erred in permitting, over defendant's objection, the plaintiff and witness Houser to give their opinion as to the amount of plaintiff's damages; but it does not necessarily follow that for that reason the judgment must be reversed. If it clearly appears from the record that the incompetent testimony admitted did not influence the verdict, it will not be cause for reversal: *Heneky v. Smith*, 10 Or. 349 (45 Am. Rep. 143); *French v. Cresswell*, 13 Or. 418 (11 Pac. 62); *Strickland v. Geide*, 31 Or. 373 (49 Pac. 982); 13 Cyc. 193.

The record discloses that the plaintiff claimed damages to the amount of \$150, and after having testified about the condition of the crop, and the amount destroyed, and the value,

he was permitted to testify that his damages amounted to that much at least, while Houser testified that they were as much as \$200 to \$300; and he also gave testimony of the condition of the crop and the value of hay to a person in the position that plaintiff was, but the verdict was for only \$65. The jury could not have found that plaintiff was entitled to only \$65 if they had given any weight to the opinion evidence of either of these witnesses. There was no counterclaim or offset pleaded by which the jury could have reduced, to the amount of the verdict, the estimate of damages made by plaintiff or Houser when testifying. At the same time, there was other and competent testimony from which they may have, and no doubt did, frame their verdict. The case of *French v. Cresswell*, 13 Or. 418 (11 Pac. 62) in one respect is very similar to this action. Mr. Justice THAYER, at page 424 of 13 Or. (page 64 of 11 Pac.), says:

"We have noticed the exceptions taken to the admission of testimony regarding the amount of damages sustained by the respondent in consequent of the sheep feeding upon the land, and agree with the appellant's counsel that many of the questions asked the witness upon that subject were informal; but the verdict was so small that we have concluded that the appellant could not have been materially injured on account of it. If the respondent was entitled to any verdict at all, she was certainly entitled to the amount recovered."

2. Error is also assigned to the effect that all the witnesses, including plaintiff, were permitted to testify as to what was the value of the hay crop as if the same had been raised, harvested, and ready for use in feeding season, while it was alleged and admitted that the crop was a growing crop, and that no allowance or deduction was made for the necessary expense and trouble of raising and harvesting the crop.

3. To support this contention, it is asserted that no testimony whatever was offered to show how many tons of hay the crop would have made, if not injured, or what the cost of caring for and harvesting the same would have been. No testimony to that effect appears in the record, it is true; but the bill of

exceptions, however, does not purport to contain all of the evidence, but only "a sufficient amount to explain the exceptions," and there is no statement therein to the effect that no such testimony as asserted was offered. Unless it affirmatively appears in the record to the contrary, it must be presumed, therefore, that there was testimony of that character introduced sufficient to support the verdict.

4. The defendant at the trial offered proof tending to show that, for several years prior to the entry and settlement by plaintiff and his lessor of the lands alleged to have been trespassed upon, and while the same were vacant, unappropriated public lands of the United States, the portion thereof over which defendants' sheep passed had been used for a road or trail for the passage of all kinds of public travel, except wheeled vehicles; that it had been during all those years habitually and continuously used as a road over which passed persons on foot and on horseback, such as stockmen, ranchers, miners, prospectors, and in fact any and all persons who had occasion to travel in or through that vicinity, especially stock raisers and drovers in driving large bands of stock, such as horses, cattle, and sheep, to and from the public ranges above and below those lands; that said road or trail lies in a very deep, narrow, canyon, sometimes called a "box canyon," through which runs the Imnaha River; that along the sides or bluffs of this canyon are high perpendicular cliffs or walls of rock, commonly called "rim rock," running parallel to the river, and which naturally confine the travel to the narrow bottoms and lower edges of the cliffs, and between the "rim rock" and the river; that it had been thus continuously used as such road by the general public long before and up to the time the lands alleged to have been trespassed upon were entered or settled upon; that on account of the narrow space of ground upon which it was practicable to travel, the road or trail became a well-worn and well-defined line of travel; that the road had been recognized as a public highway by the public and road authorities from the year 1896 to the time it was obstructed

by plaintiff; that since 1896 the road supervisors of the road district, in which said road or trail is situated, caused work to be performed on this road, some upon and along the lands alleged to have been trespassed upon; that the width of the line of travel varied through these lands.

In some places it was confined to one path or trail, on account of the proximity of the rim rocks to the river; while at other places, where there were small flats or bottoms, the line of travel would broaden out and cover almost all the level ground, which the testimony showed to be on those flats not more than 75 yards wide. Proof was also offered tending to show that the road ran right through the middle of those flats, and would take about all of them, not less than 60 feet in any place on those flats, but generally a great deal more, especially when a band of loose stock were driven along there, in which cases the stock would spread out and cover all the flats; that the travel on this road or trail was continuous, uninterrupted, and unobstructed until the fall of 1905, when plaintiff settled there and inclosed three of those little flats, by building wire fences connected with the rim rocks in such manner as to form a separate inclosure of each flat, and at the same time obstruct and inclose the road where it ran across each flat, and forced the travel to leave the old road and pass along a narrow passageway from 16 feet to 20 feet wide next to the bank of the river. Upon this testimony the court's instructions were based. Defendant excepted to the words "long-continued user," used by the court in its third instruction, which is as follows:

"But by Rev. Stat. U. S. § 2477 (U. S. Comp. St. 1901, p. 1567), a right of way for the construction of highways is granted over public lands of the United States, and long-continued user by the public is sufficient to establish that the United States' grant of the way has been accepted by the public."

Defendant also excepted to the words "for a long period, viz., 10 years or more," used by the court in the fourth instruction, which, in part, is as follows:

"And if you find that, while this land over which the trail

lies was United States lands, the public for a long period, viz., 10 years or more, used as a public highway a definite path or trail as a means of passage from one point to another, then I instruct you that such trail became thereby a public highway," etc.

Based on these exceptions, error is assigned.

5. The act of Congress referred to by the court is an express dedication of a right of way, and an acceptance of the grant, while the land is a part of the public domain, may be effected by public user alone, without any action on the part of the public highway authorities. When an acceptance thereof has once been made, the highway is legally established, and is thereafter a public easement upon the land, and subsequent entrymen and claimants take subject to such easement: *Wallowa County v. Wade*, 43 Or. 253 (72 Pac. 793); *McRose v. Bottyer*, 81 Cal. 122 (22 Pac. 393); *Smith v. Mitchell*, 21 Wash. 536 (58 Pac. 667); 75 *Am. St. Rep.* 858). When the general public enter upon public lands not reserved for public use, for the purpose of appropriating a definite portion thereof for a highway, or to lay out or construct a highway for public use they do so with the consent of the owner previously given by express dedication. Under such circumstances, the duration of the user is not material, so long as it is sufficient to clearly assert an intention on the part of the general public to make such appropriation; but when there is no express dedication, and user is relied upon to raise a presumption of dedication, the entry is presumed to be against the consent of the owner, and the duration of the user is then material. The law upon this question has been well stated as follows:

"Except when user is relied on to raise a presumption of dedication, the duration of the user is wholly immaterial. It is not necessary that such user should continue any definite length of time. * * While no dedication will be presumed from user alone, unless the user has been so long and so general that the public convenience would be materially affected by its interruption, no such requirement applies strictly as to the user which constitutes the acceptance of a dedication otherwise established; it being only necessary that those who would

naturally be expected to enjoy it do, or have done so, at their pleasure and convenience": 13 Cyc. 465, 466.

The court, when using, in the third instruction, the language to which objection is made, has not declared "long-continued user" essential to establishment of the highway; but the language of the instruction is "long-continued user by the public is sufficient," which is undoubtedly correct.

6. And, when giving the fourth instruction, the court has not declared a user "for a long period, viz., 10 years or more," necessary to the legal establishment of the highway; but the court has said, in effect, that, if you find a user for that period of time, then such trail became a legal highway, and such is the law. The instructions were applicable to the testimony, for the record shows that the uncontroverted testimony was that the public had traveled along this route from prior to 1896, up to May, 1906, when the damage was done. But if it could be fairly said that the jury may have understood the court to have meant by these instructions that such long-continued user was necessary to the legal establishment of the highway, yet it is plainly manifested by the verdict that they did not so interpret the instruction. They must have necessarily found that the highway claimed by the defendant did in fact exist, for the amount of their verdict is manifestly for the value of part only of the crop, that part not on the highway, otherwise the verdict must have been for a much larger amount. There was testimony that damage was done off of the track of the asserted highway, and the court also instructed the jury as follows:

"But even though you find that the trail is a legal highway, if you find that the defendant in so passing his sheep across plaintiff's fields, at the points complained of, permitted his sheep to do any unnecessary damages—that is, damages off the trail that could have been reasonably avoided—then, still defendant would be liable for such unnecessary damages."

In any event, therefore, neither of these instructions could have injured the defendant.

7. Objection was also made by defendant to the following

instruction: "If the trail was a legal highway, then it must be considered of reasonable width for the convenient use of the public, not to exceed 60 feet." The defendant contends that the limitation of 60 feet was erroneous. Where the right to a highway depends solely upon user by the public, its width and the extent of the servitude imposed on the land are measured and determined by the character and extent of the user, for the easement cannot on principle or authority be broader than the user. This does not mean, however, that the public will be confined to the precise portion of the soil on which the wheels of passing vehicles may run, commonly called the track: *Bayard v. Standard Oil Co.* 38 Or. 438 (63 Pac. 614: 13 Cyc. 488). While it is the general rule that the width of a highway established by user is limited to the ground actually used, the question is usually for the jury, giving proper consideration to the circumstances and conditions attending the use. *Bayard v. Standard Oil Co.* 38 Or. 438. On the other hand, the public cannot acquire a prescriptive right to pass over land generally, but the user must be by way of a certain well-defined line of travel: Elliott, *Roads & Sts.* (2 ed.) § 176: *Bayard v. Standard Oil Co.* 38 Or. 438 (63 Pac. 614). It would be unreasonable, however, to say that, where loose stock being driven travel promiscuously, although in a generally uniform direction, over a strip of land 75 to 100 yards in width, the user is thereby confined to a certain and well-defined line of travel, and that a right of easement attaches to the whole width thereof, because the claim is broader than the reasonable necessity of the case. The unreasonableness of the asserted claim is established by the fact shown by this record that, at other places on this same trail, the thread of travel is only a few feet in width, being confined and limited by the nature of the country to such smaller latitude.

8. While the extent of the user and the reasonable width of the highway is generally for the jury, we cannot say, under the facts of this case, that it was reversible error for the court to fix sixty feet as the maximum width beyond which they could not

go, in view of the provisions of the general law of this State, to the effect that all county roads shall be 60 feet in width, unless the county court shall, upon prayer of the petitioners, determine upon a different width not less than 40 nor more than 80 feet: Section 4790, B. & C. Comp. (Laws 1903, p. 267). County roads are for all kinds of travel, including wheeled vehicles, and it must be assumed that such width is ample for all purposes. It is therefore reasonable to say that such limit must be ample for the kind of travel passing along this trail. In view of the facts shown by the record, that stock traveling along this route scattered out and used the whole width of these bottoms, the court might well have submitted to the jury whether or not the 16 or 20 feet, not inclosed, but left by plaintiff for the use of the public, being a part of the traveled track, was not a reasonably sufficient width for the general purpose of the highway. While an entryman takes, subject to a previously established public easement, such as the one in question, and he may not obstruct or shift it, or interfere with it to the detriment of the public, yet such easement must necessarily be confined to a reasonable width; but, where an unreasonable width has been attempted to be appropriated, no right of the public has been encroached upon, if, in inclosing his land, an entryman leaves a reasonably sufficient width of the traveled track open for the use of the public.

Not finding any reversible error in the record, it follows that the judgment should be affirmed.

AFFIRMED.

Argued 7 August, decided 8 September, 1907.

STEVENS v. BENSON.

91 Pac. 577.

CONSTITUTIONAL LAW—LEGISLATIVE ACTION—DIRECTION—SELF-EXECUTING PROVISIONS.

1. Const. Or. Art. IV, § 1, as amended in 1902, reserving to the people initiative and referendum powers, and providing for the submission of legislation to the voters of the State or other political subdivision, is self-executing.

SAME—ENFORCEMENT—STATUTES.

2. Laws 1907, p. 399, providing the procedure to facilitate the enforcement of the initiative and referendum powers reserved to the people by Const. Or.

Art. IV, § 1, as amended in 1902, was a proper exercise of legislative power, though the constitutional provision was self-executing.

STATUTES—DIRECTORY PROVISIONS.

3. Laws 1907, p. 399, providing for the carrying into effect of the initiative and referendum powers reserved to the people, provided (section 1) a form of petition, which was required to be substantially followed. The form contained a warning clause that it was a felony for any one to sign any such petition with any name other than his own, or to knowingly sign his name more than once to the same measure, or to sign such petition when he was not a legal voter. Section 2 of same act declares that the form given was not mandatory, and if substantially followed in any petition it will be sufficient, regardless of clerical or mere technical errors. *Held*, that the form, in so far as it contained the warning clause, was merely directory, and that a referendum petition omitting such clause was not thereby fatally defective.

From Marion: WILLIAM GALLOWAY, Judge.

Suit brought by Robert L. Stevens against F. W. Benson, as Secretary of State, to enjoin the filing of a petition, referring to a vote of the people of the State, under the referendum provision of the constitution, an act passed by the legislature February 16, 1907 (Laws 1907, pp. 53, 54) providing for the custody and control of persons confined in county jails, etc.

From a decree in favor of plaintiff, defendant appeals.

For appellant there was a brief over the names of *Mr. Andrew M. Crawford*, *Mr. Lionel R. Webster* and *Mr. Seneca Smith*, and oral arguments by *Messrs. Crawford, Webster and Smith*.

For respondent there was a brief with oral arguments by *Mr. Dan J. Malarkey* and *Mr. John F. Logan*.

REVERSED: SUIT DISMISSED.

Opinion by MR. JUSTICE EAKIN.

1. On May 18, 1907, there was filed in the office of the Secretary of State a petition for referring to a vote of the people of the State, under the referendum provision of the constitution, an act passed by the legislative assembly in February, 1907, providing for the custody and control of persons confined in county jails, etc.; and this suit was brought by plaintiff to enjoin defendant, as Secretary of State, from filing said petition tendered. Demurrer to the complaint was overruled, and final decree thereupon rendered enjoining the filing of the petition.

The objection to the petition was that it did not contain the warning clause required by section 1 of the act of the legislative assembly of 1907 (Laws 1907, 399), which provides for carrying into effect the initiative and referendum. Section 1 of that act provides:

"The following shall be substantially the form of petition for the referendum to the people on any act passed by the legislative assembly of the State of Oregon, or by a city council:

"WARNING.

"It is a felony for any one to sign any initiative or referendum petition with any name other than his own, or to knowingly sign his name more than once for the same measure, or to sign such petition when he is not a legal voter.

"PETITION FOR REFERENDUM.

"To the Honorable, Secretary of State for the State of Oregon (or to the Honorable Clerk, Auditor, or Recorder, as the case may be, of the City of):

"We, the undersigned citizens and legal voters of the State of Oregon (and the district of, County of, or City of, as the case may be), respectfully order that the Senate (or House) Bill No. entitled (title of act, and if the petition is against less than the whole act then set forth here the part or parts on which the referendum is sought), passed by the legislative assembly of the State of Oregon, at the regular (special) session of said legislative assembly, shall be referred to the people of the State (District of, County of, or City of, as the case may be), for their approval or rejection, at the regular (special) election to be held on the day of, A. D. 19 , and each for himself says: I have personally signed this petition. I am a legal voter of the State of Oregon, and (District of, County of, City of, as the case may be). My residence and post office are correctly written after my name.' * *

"Sec. 2. * * The forms herein given are not mandatory, and if substantially followed in any petition it shall be sufficient, disregarding clerical and merely technical errors."

The provisions of the constitution involved are as follows: Section 1, Art. IV, amendment of 1902, namely:

"The legislative authority of the State shall be vested in a legislative assembly, consisting of a Senate and House of Representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent. of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon.

The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by the petition signed by five per cent. of the legal voters, or by the legislative assembly, as other bills are enacted.

Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. * * Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment until legislation shall be especially provided therefor."

The question arises: Is this section of the constitution self-executing? A constitutional provision is said to be self-executing if it enacts a sufficient rule by means of which the right given may be enjoined and protected. The language used, as well as the object to be accomplished, is to be looked into in ascertaining the intention of the provision. As said in *Willis v. Mabon*, 48 Minn. 140 (50 N. W. 1110: 16 L. R. A. 281: 31 Am. St. Rep. 626):

"The question in every case is whether the language of a constitutional provision is addressed to the courts or the legislature. Does it indicate that it is intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration both of the language

used and the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed are fixed by the provision itself so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing."

To the same effect are *Acme Dairy Co. v. City of Astoria*, 49 Or. 520 (90 Pac. 153); *Swift v. City of Newport*, 105 Va. 108 (3 L. R. A. (N. S.) 404, 52 S. E. 521); *Taylor v. Hutchinson*, 145 Ala. 202 (40 South. 108); *Logan v. Parish of Ouachita*, 105 La. 490 (29 South. 975). As expressed by one court, whether it is intended thereby to declare personal rights of a citizen or to define a rule for the government of the legislature; and, if the former, it is legislative, and needs no legislation to give it force. It is plainly expressed in the provision itself in this case that its reserved rights are to be independent of the legislature, and is sufficiently specific that it may be carried out without legislative aid (*Logan v. Parish of Ouachita*, 105 La. 499 (29 South. 975)); and in the last clause it provides that the Secretary of State, in submitting to the people the matter referred, shall be governed by the general laws until further provision is made by the legislature, thus not only contemplating that such legislation is not necessary as to procuring and presenting the petition, but also forestalling any possibility of defeat, by inaction of the legislature in regard to the manner of its submission to the people. As said in *Willis v. Mabon*, 48 Minn. 140 (31 Am. St. Rep. 626: 16 L. R. A. 281: 50 N. W. 1110); "The object being to put it beyond the power of the legislature to render them nugatory by refusing to enact legislation to carry them into effect." If it were not self-executing, even though it were mandatory upon the legislature to make provision to carry it into effect, there is no power to compel it to do so. The exercise of that power in any particular case must depend on the volition of the legislature: *Cooley Const. Lim.* (7 ed.) 121; *In re State Census*, 6 S. D. 540 (62 N. W. 129); *People ex rel. v. Rumsey*, 64 Ill. 44.

Thus a strong reason appears why it was intended to be self-executing, and it should be so considered.

2. But, when a provision of the constitution is self-executing, legislation may be desirable for the better protection of the right secured and to provide a more specific and convenient remedy for carrying out such provision, and it is plain that the statute in question, was intended for that purpose, and reduces to a system and simplifies the proceeding; makes every step definite, as well as placing safeguards around it to protect it from abuse, without curtailing the right or placing any undue burdens upon its exercise. As said by Judge Cooley, in his work on Constitutional Limitations (page 122), a constitutional provision that is self-executing may admit of supplementary legislation in particulars wherein itself it is not as complete as may be desirable. It will also override and nullify whatever legislation, either prior or subsequent, would defeat or limit the right: *Reeves v. Anderson*, 13 Wash. 17 (42 Pac. 625); *Beecher v. Baldy*, 7 Mich. 488; *Willis v. Mabon*, 48 Minn. 140 (50 N. W. Rep. 1110; 16 L. R. A. 281; 31 Am. St. Rep. 626); *Swift v. City of Newport News*, 105 Va. 108. And so the legislature may enact laws to facilitate the enforcement of constitutional provisions that are self-executing, and such laws will be obligatory upon the court when intended by the legislature to be mandatory, so long as they do not curtail the rights reserved or exceed the limitations specified therein: *Ordonaux*, Const. Leg. 262-265; *People v. Draper*, 15 N. Y. 532. Cooley's Constitutional Limitations (7 ed.). 126. lays down a fundamental rule as to the power of the legislature in such cases as follows: "In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in and may be exercised by the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of spe-

cifically defined legislative powers, but is intrusted with the general authority to make laws at discretion." And in *Willis v. Mabon, supra*, the court holds, that the remedy for enforcement of a self-executing constitutional right is always within the control of the legislature to modify, change, or make exclusive, provided only it remains adequate, but is beyond the power of the legislature to defeat its object: *Hickman v. City of Kansas*, 120 Mo. 110 (25 S. W. 225: 23 L. R. A. 658: 41 Am. St. Rep. 684).

3. It is claimed by defendant, however, that the statute in this case, in so far as it relates to the warning clause contained in the form for the petition, is directory only, and that it constitutes no element of the petition proper, and therefore its omission from the petition in this case is not fatal. The statute has not in terms enacted that there shall be a warning clause upon the petition, but only in giving the form of the petition included a warning therein, which it provides "shall be substantially the form of petition," and further provides that "the forms herein given are not mandatory, and if substantially followed in any petition it will be sufficient, disregarding clerical and merely technical errors." This part of the statute is only a provision of a form to aid in carrying out a right already existing independent of the statute, and expressly states that it is not mandatory: Lewis' Sutherland, Stat. Const. § 627, says:

"When the proceeding is permitted by the general law, and an act of the legislature directs a particular form and manner in which it shall be conducted, then it will depend on the terms of the act itself whether it shall be considered merely directory, subjecting the parties to some disability if it be not complied with, or whether it shall render the proceeding void."

If the legislature creates a right, and at the same time prescribes the mode of its exercise, then such mode would be mandatory and exclusive; but when the right exists, and may be exercised effectually without such provision, and the legislative provision only relates to its better enforcement, the intention of such provision must be gathered from the act and

its declared purpose whether it shall be construed mandatory or directory. Section 611 of Sutherland, Stat. Const., provides:

"Unless a fair consideration of a statute directing the mode of proceeding of public officers shows that the legislature intended compliance with the provision in relation thereto to be essential to the validity of the proceedings it is to be regarded as directory merely. Those directions which are not of the essence of the thing to be done but which are given with a view merely to the proper, orderly and prompt conduct of the business and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory and if the act is performed, but not in the time or in the precise mode indicated, it will still be sufficient if that which is done accomplishes the substantial purposes of the statute."

To the same effect are 23 Am. & Eng. Enc. Law (1 ed.). 458; *Thomson v. Harris*, 88 Hun, 481 (34 N. Y. Supp. 885); *Custer County v. Yellowstone County*, 6 Mont. 39 (9 Pac. 586). Negative words, or words of prohibition, or a penalty affixed to the requirements of a statute make such provision mandatory, and must be complied with or where the requirement is a necessary element of the thing to be done, or affects the rights or burdens of the persons interested, it must be observed. *People v. Supervisors of Ulster*, 34 N. Y. 268; *Corbett v. Bradley*, 7 Nev. 108. But the directions in a statute which are not of the essence of the thing to be done, but which are given with a view to the orderly and prompt conduct of the business, and by a failure to do which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory: 5 Words and Phrases, 4332; *Custer County v. Yellowstone County*, 6 Mont. 39 (9 Pac. 586); *Bladen v. Philadelphia*, 60 Pa. 464. But there is an absence of anything indicating an intention that it shall be mandatory. On the contrary, it is clear that it is only directory. It is not of the essence of the thing to be done, viz.: Direct the Secretary of State to submit to the vote of the people at the next election the act known as "House Bill No. 243." There is no affirmative provision for it in the act, nor negative or prohibi-

tive words relating thereto, and the statement following the forms that they shall not be mandatory leads us to the conclusion that the statute providing the warning clause in the form of petition is only directory, and its omission from the petition does not render it void; and the Secretary of State properly received the same for filing, and the lower court erred in overruling the demurrer and in granting the injunction.

Therefore the decree of the lower court is reversed, and, this being the only question involved in the case, decree will be entered here dissolving the injunction and dismissing the case.

REVERSED.

Mr. Chief Justice BEAN did not take part at the hearing of this case and *Palmer v. Benson*, being a regent of the University of Oregon, the party interested in the latter case, and the question here decided being involved in both.

Argued 8 August, decided 8 September, 1907.

PALMER v. BENSON.

91 Pac. 577.

STATUTES—REFERENDUM—PETITION.

Laws 1907, p. 890, § 1, provides a form of petition for the carrying into effect of the referendum powers reserved to the people, and section 2 declares that every sheet of the petition for petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed by the initiative petition, but such petition may be filed with the Secretary of State in numbered sections, for convenience in handling, and referendum petitions shall be attached to a full and correct copy of the measure on which the referendum is demanded and may be filed in numbered sections in like manner. *Held*, that, while an initiative petition is required to contain a correct copy of the title of the act, a referendum petition containing a full and correct copy of the act without the title is sufficient.

From Marion: WILLIAM GALLOWAY, Judge.

Statement by MR. JUSTICE EAKIN.

On the 23d day of May, 1907, the plaintiffs and others presented to the Secretary of State for filing a petition directing a reference to the people, under the referendum provision of the constitution, a measure passed by the legislative assembly in February, 1907, known as "House Bill No. 37," to increase the annual appropriation for the support of the Univer-

sity of Oregon. Defendant refused to receive or file the said petition, and the plaintiffs bring this proceeding by mandamus to compel defendant to file said petition. Defendant answered to the writ of mandamus, denying the allegations of the same and alleging affirmatively that said petition is not in the form prescribed by section 1 of the act of the legislative assembly of 1907 (Laws 1907, p. 399), providing for carrying out the initiative and referendum, in that it did not contain the warning clause provided for in said act, and further, that it does not contain a full and correct copy of the title and text of the measure sought to be referred. A reply was filed to the answer, and the cause tried in the court below upon the pleadings alone, and only two questions raised by the answer are suggested upon this appeal.

The objection made by defendant that the petition does not contain the warning clause provided by the statute, has been fully considered in the case of *Stevens v. Benson*, 50 Or. 269 (91 Pac. 577), just decided, and the decision in that case disposes of the objection here adversely to defendant. The only other question for consideration is whether the petition for the referendum must be attached to a full and correct copy of the title and text of the measure to be referred, or whether a full and correct copy of the text of the measure is sufficient.

REVERSED AND REMANDED.

For appellants there was a brief and oral arguments by *Mr. Tilmon Ford* and *Mr. Myron E. Pogue*.

For respondent there was a brief and oral arguments by *Mr. Andrew M. Crawford* and *Mr. George G. Bingham*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. The constitutional provision and the form of petition provided by the statute, upon which the proceeding is based, are set out in full in *Stevens v. Benson*, 50 Or. 269 (91 Pac. 577). Section 2 of the act to provide for carrying into effect the initiative and referendum (Laws 1907, p. 399), so far as it relates to the question here discussed, is:

"Every such sheet for petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed by the initiative petition; but such petition may be filed with the Secretary of State in numbered sections for convenience in handling, and referendum petitions shall be attached to a full and correct copy of the measure on which the referendum is demanded and may be filed in numbered sections in like manner. Not more than twenty signatures on one sheet shall be counted," etc.

The petition in this case did contain a full and correct copy of the text of the act, but erroneously gave the title of the act as "A bill for an act to increase the annual appropriation for the support and maintenance of the University of Oregon," when the real title of the act as passed is "An act to amend Section 3529 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon, by increasing the annual appropriation for the support and maintenance of the University of Oregon," and this discrepancy in setting out the title of the act is the ground assigned for the insufficiency of the petition. The purpose of the title to a bill or measure before the legislature is, as stated in *Clemmensen v. Peterson*, 35 Or. 48 (56 Pac 1016):

"To prohibit the legislature from combining in one act subjects wholly incongruous, diverse in their nature, and having no perceptible or necessary connection with each other, and to obviate the practice of inserting in an act clauses involving matter of which the title is not calculated or adequate to give or convey any intimation. Thus it was designed by the framers of the constitution that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly satisfied of its purpose by an inspection of the title, when required to pass upon it, so as not to be surprised or misled by the subject which the title purported to express."

Neither the reason nor the necessity for such a title to a bill before the legislature exists with reference to the referendum proceeding. The purpose of the petition for referendum is to identify a particular enactment of the legislative assembly which the petitioners desire to have referred to the people—a question of identity, not of legislation. There is a dis-

tion in that regard between the referendum and the initiative, in which latter legislation is initiated and the whole matter must be formulated just as it is to be submitted to the people, while in the referendum it is only a question of the approval or disapproval by the people of what the legislature has already enacted as a law. Section 1 of Article IV of the Constitution of Oregon recognizes this distinction by providing that the initiative petition shall "include the full text of the measure," while as to the referendum no reference is made as to the manner in which the measure shall be mentioned in the petition. Section 2 of the legislative act of 1907 (Laws 1907, p. 400) recognizes the same distinction, providing that the initiative petition "shall be attached to a full and correct copy of the title and text of the measure," etc., and "a referendum petition shall be attached to a full and correct copy of the measure," etc. And when we consider the purpose of the petition, namely, to bring to the attention of the Secretary of State a particular act for reference to the people, a petition that will identify such act and shall be sufficiently plain, that neither the signers of the petition nor the Secretary of State may be mistaken as to what is meant, will accomplish all that the constitution contemplates, and the "full text of the measure" fills this requirement.

Considering this fact in connection with the constitutional requirement as to the contents of the initiative petition, as compared with those of referendum petition, helps to explain the difference in such requirements as prescribed by the statute. There can be no doubt that the term "measure," as used here, means an act as it comes from the hands of the legislature at the close of the session, complete so far as it is concerned. It is the enactment with which we have to do, and we do not think that the term "measure," in this connection, necessarily includes the title of the act; but, if the term is broad enough to do so, it is immaterial. The title is not an element to be submitted to the voter, or even considered by him. The measure is to be placed upon the ballot only by a ballot title

in the nature of a statement of the purpose of the measure, and the legislature could have no purpose in requiring that the title of the act should be contained in the petition, other than as a matter of identity, which they evidently considered complete without it. In the form of petition prescribed by the statute provision is made for inserting the title of the act, but in that particular the form is only suggestive. It contemplates placing the act in the body of the petition, at least when less than the whole act is attacked; but clearly the legislature did not so intend. The initiative petition is not so arranged and the statute does not contemplate it, but provides that the "referendum petitions shall be attached to a full and correct copy," etc.

Evidently the petition must be on every sheet on which signatures are placed, but the act will be on a separate sheet, as clearly appears further on in said Section 2, so that the mention of the title of the act in the form for the petition can only be taken as suggestive, and is of but very little aid in interpreting the text of this statute. It must be conceded that the legislature intended to make a distinction between the manner of setting out the act in initiative petitions and in referendum petitions, as in relation to the former it declares that the petition shall contain a copy of the title and text of the measure, and as to the referendum petition, being a part of the same sentence, it shall contain a copy of the measure, and we deem it a compliance with the requirement of the statute to attach the referendum petition to a full and correct copy of the text of the measure.

The judgment of the lower court will be reversed, and the cause remanded, with directions to said court to make peremptory the mandate of the alternative writ.

REVERSED AND REMANDED.

Mr. Chief Justice BEAN did not take part at the hearing of this case, being a regent of the University of Oregon, the real party interested herein.

Argued 9 May, decided 2 July, 1907.

STUBLING v. WILSON.

90 Pac. 1011, 92 Pac. 810.

FRAUDULENT CONVEYANCES—SETTING ASIDE—BURDEN OF PROOF.

1. Where a conveyance by a debtor to his brother is attacked as fraudulent as to creditors, the burden is on the grantee to allege and prove that he purchased without notice of the fraudulent intent and for a valuable consideration.

SAME—SUFFICIENCY OF EVIDENCE.

2. In an action to set aside a conveyance as fraudulent as to creditors, evidence examined, and *held* sufficient to show notice to the grantee of the fraudulent intent of the grantor at the time of the execution of the deed.

APPEAL—BONDS—LIABILITY.

3. Section 550, B. & O. Comp., provides that an undertaking on appeal shall be to pay all damages and costs awarded on the appeal, but that in various cases the undertaking shall not stay proceedings, unless it further provides for payment of the judgment as affirmed. Section 551 provides that, when an appeal is perfected with an undertaking for the appeal only, "proceedings shall be stayed as if the further undertaking thereof had been given." In a creditors' suit to uncover property that had been placed beyond the reach of an execution based on a judgment which plaintiff had recovered against defendants, defendants appealed from a decree against them, and, though the decree was not within section 550, the appeal bond was conditioned that the obligors would abide by the decision of the Supreme Court, and satisfy the judgment and decree so far as affirmed. *Held*, that the surety on the bond on affirmation of the decree was only liable for costs in both courts in the creditors' suit.

From Gilliam: W. L. BRADSHAW, Judge.

Statement by MR. JUSTICE EAKIN.

This is a creditors' suit to uncover property alleged to have been fraudulently conveyed. There was decree for plaintiff, and defendants appeal.

On March 4, 1904, one Jef Neal, a saloon keeper of Condon, Oregon, was indebted to the plaintiff, a wholesale liquor dealer of The Dalles, for goods previously sold, for which payment was overdue and, in consideration of an extension of the time of payment for nine months, defendant, Frank Wilson, jointly with Neal, executed and delivered to plaintiff his promissory note therefor in the sum of \$1,526.35, due nine months after date. Thereafter, on June 26, 1904, said Neal, being hopelessly in debt, in consideration that Frank Wilson would pay certain debts of Neal, including the note to plaintiff, transferred to said Frank Wilson his saloon stock, business and fix-

tures, without other consideration, and said Wilson took possession thereof, and on the same day a portion of said stock of goods was attached in an action by Wilmerding Lowe Company against Jef Neal. On the 25th day of June, 1904, said Frank Wilson conveyed to defendant Fred Wilson, his brother, the south half of lot 4, of block 4, of the town of Condon, which deed plaintiff seeks to set aside for fraud. Fred Wilson was in the saloon business in Condon, and the defendants had formerly been partners in such business. Upon the maturity of the note of plaintiff he brought an action in the circuit court for Gilliam County to recover upon said note, and had the said south half of lot 4 of block 4 attached in said suit, and thereafter, on February 24, 1905, brought this suit against Frank and Fred Wilson to have said conveyance canceled as an obstruction to the enforcement of said attachment lien. Defendants answer separately, but practically make the same defense, viz., that the transfer of said lot from Frank to Fred was made in good faith for valuable consideration and without notice to Fred of any fraud.

AFFIRMED.

For appellant there was a brief and oral arguments by *Mr. R. R. Butler* and *Mr. William H. Wilson*.

For respondent there was a brief and an oral argument by *Mr. Frederick W. Wilson*.

MR. JUSTICE EAKIN delivered the opinion of the court.

We consider that there can be no question of the fraudulent intent on the part of Frank Wilson in making the deed to Fred to put his property out of the reach of plaintiff and prevent the collection of this note. Knowing that Neal was hopelessly in debt, he volunteered to Neal, unsolicited, to sign this note to plaintiff and to obtain nine months' extension of the time for payment, and within a few days after making this deed to Fred stated to Neal that Neal had paid Stubling enough money; that, if he was to lose this note, he would not be out anything, and that he (Frank Wilson) would not pay him anything. At that time, and before and after, he was carrying out of the Neal

saloon portions of the stock to Fred's saloon across the street, and the fraudulent purpose on his part clearly appears. Plaintiff claims that Fred Wilson took the deed with notice of the fraud, and also without consideration. This being a transaction between brothers, by which all of the property of Frank is sought to be placed beyond the reach of execution, and the transfer is attacked for fraud, the burden is cast upon the defendant Fred Wilson to allege and prove that his purchase was made without notice of the fraudulent intent of Frank and for a valuable consideration. *Weber v. Rothchild*, 15 Or. 385 (15 Pac. 650; 3 Am. St. Rep. 162). Defendants seek to cast the burden of proving want of consideration upon the plaintiff, and hence, at the trial, have done no more than testify that there was a consideration, viz., a conveyance of property in Michigan. The evidence of the facts as to this consideration was peculiarly within the power and knowledge of defendants, and it was their duty to produce it or submit to the inferences that might be drawn from its nonproduction. *Mendenhall v. Elwert*, 36 Or. 375 (52 Pac. 22, 59 Pac. 805). And it must be established by satisfactory proof of the consideration. *Mendenhall v. Elwert*, *supra*; *Marks v. Crow*, 14 Or. 382 (13 Pac. 55).

2. Counsel for appellants question the correctness of the statement of law made in *Robson v. Hamilton*, 41 Or. 239 (69 Pac. 651), and *Mendenhall v. Elwert*, *supra*, to the effect that when a failing debtor conveys property to a relative, and his creditors sustain loss thereby, the law will presume that such relative was aware of the fraudulent intent of the grantor; but by a reading of the opinion it plainly appears that the court is emphasizing the fact that the burden of proof in such case is cast upon the grantee, and we understand that to be the law by all the authorities, viz., that by virtue of the relation of the parties, the fraudulent intent of the debtor being established, the transaction is looked upon with suspicion, and the burden is shifted and cast upon the grantee to allege and show consideration and want of notice, the evidence of both of these

matters being peculiarly within the knowledge and control of such grantee, and not accessible to plaintiff, and, if not produced, it will be considered as due to inability to show such facts. This is the effect of *Marks v. Crow*, 14 Or. 382 (13 Pac. 55) ; *Weber v. Rothchild*, 15 Or. 385 (15 Pac. 650: 3 Am. St. Rep. 162) ; *Garnier v. Wheeler*, 40 Or. 198 (66 Pac. 812), and *Jolly v. Kyle*, 27 Or. 95 (39 Pac. 999), and reiterated in many other Oregon cases.

It is not a sufficient compliance with the rule for defendant to simply deny want of consideration or by a general statement assert that the consideration was a conveyance of lands in Michigan. The evidence must be such as to convince the court of its truth. It was in the power of defendants to establish the fact that Fred owned land in Michigan, and that this land was actually conveyed to Frank at the time and in the manner claimed. It is said in *Tredwell v. Graham*, 88 N. C. 208, and quoted with approval in *Weber v. Rothchild*, *supra*, that "the deed itself, though evidence conclusive, as to all matters between the parties, furnishes no evidence of the truth of the matters contained in its recitals, as against strangers, for as to them it is strictly *res inter alios acta*." In the absence of such proof and in view of the other circumstances proven, we conclude that the conveyance to defendant Fred Wilson June 25, 1904, was without consideration: *Marks v. Crow*, 14 Or. 382 (13 Pac. 55) ; *Weber v. Rothchild*, 15 Or. 385 (15 Pac. 650: 3 Am. St. Rep. 162). Nor is there any presumption of consideration from the recital in the deed.

Also we think the evidence is sufficient to establish notice to Fred of the fraudulent intent of Frank at the time of the execution of the deed. Defendants were living in the same house, and had recently been partners in the saloon business. The deed was made the day before Frank took over Neal's saloon, and thereafter much of the Neal goods were transferred at different times to Fred's saloon. Frank testified that the goods thus carried over to Fred's saloon were only to supply Fred in an emergency, and this was the theory of the defense; but Fred testifies that he did not use any of them and derived no

benefit from them; that they were taken back—"the same identical liquor." And on cross-examination, when asked why any of it was taken to his place, said: "You will have to ask Frank about that. I was not supposed to know. I wasn't over there." This contradicts Frank, and shows that it was done with Fred's knowledge and connivance, and, although subsequent to the execution of the deed, it was only a few days subsequent, and tends to disclose a dishonest purpose to which Fred was a party; and the conclusion is irresistible that Fred was at least cognizant of the fraudulent intent of Frank at the time of the execution of the deed, and the deed was fraudulent and void as against plaintiff.

There was no error in the rulings of the court below, and the decree is affirmed.

AFFIRMED.

Decided 24 December, 1907.

ON MOTION TO RECALL MANDATE.

90 Pac. 810.

MR. JUSTICE EAKIN delivered the opinion.

3. Defendants by this motion seek to have the mandate recalled for the reason that the decree of this court is rendered against defendants and S. D. Fletcher, the surety, upon their undertaking on appeal for recovery of the amount of the judgment in the case of *Stubling v. Frank Wilson and Jef Neal*. 90 Pac. 1011. The undertaking on appeal provides, among other things: "They will abide by the decision of the Supreme Court and satisfy said judgment and decree so far as affirmed by the appellate court." But, notwithstanding the terms of the undertaking, it does not require more of the surety thereon than a compliance with the terms of the decree of the lower court, so far as it is affirmed.

The suit does not seek to enforce the judgment in the case of *Stubling v. Wilson and Neal*, but is a creditors' suit to uncover property that has been put out of the reach of an execution issued against the property of Frank Wilson, viz., to cancel a deed executed by Frank Wilson to Fred Wilson, that the property conveyed thereby may be made available to plain-

plaintiff in the satisfaction of his judgment against Frank Wilson; and in this suit plaintiff is not entitled to have judgment for the debt, and it was not so entered. This suit is not one that requires a special undertaking to stay execution under Section 550, B. & C. Comp., and is not included in any of the subdivisions thereof. Section 551, Id., provides that "in cases not provided for in such subdivisions [of section 550], when an appeal is perfected, with an undertaking for the appeal only, proceedings shall be stayed as if the further undertaking therefor had been given." This case comes within that provision. This appeal does not stay execution in the law action, but only in this suit, and this undertaking protects plaintiff in the enforcement of all the provisions of the decree of the lower court, which has no reference to the payment of the debt in the law action. The undertaking in this suit created a liability against the surety only for the costs of the lower court and of this court; and the mandate should be recalled and modified accordingly.

The motion is allowed.

MOTION ALLOWED.

Argued 7 Oct., decided 22 Oct., rehearing denied 17, Dec., 1907.

FREEMAN v. TRUMMER.

91 Pac. 1077.

TRIAL—FINDINGS—REQUISITES.

1. When an action is tried without a jury, the findings are equivalent to special verdicts and must be as broad as the material issues.

SAME.

2. If findings support the judgment and conform to the theory of the prevailing party, they are sufficient.

REPLEVIN—FINDINGS—SUFFICIENCY.

3. In replevin, the findings support a judgment for defendant, where they conform to the new matter averred in the answer and disprove plaintiff's right, though there are no findings conformable to the complaint, no request having been made therefor.

EXCHANGE OF PROPERTY—DISTINGUISHED FROM SALE.

4. An "exchange," as distinguished from a "sale," is a contract whereby specific property is given in consideration of the receipt of property other than money.

REPLEVIN—NATURE OF REMEDY.

5. An action to recover the possession of specific personalty, though designated, under Section 284, B. & C. Comp., as "claim and delivery," is substantially the ancient remedy of replevin.

SAME—SET-OFF.

6. Replevin being in the nature of an action *ex delicto*, a set-off of accounts between the parties cannot be settled.

SAME—DEFENSES AVAILABLE.

7. In replevin for a cash register, defendant may show that plaintiff traded cash registers with defendant's bailee, knowing of defendant's ownership, and prevent plaintiff recovering his register until he returns defendant's.

From Multnomah: ARTHUR L. FRAZER, Judge.

Submitted on briefs under Rule 16 of Supreme Court.

For appellant that was a brief by *Mr. Marion B. Meacham*.

For respondent there was a brief over the names of *Mr. John F. Logan* and *Mr. John C. Shillock*.

Statement by MR. JUSTICE MOORE.

This action was commenced in the Justice's Court for Portland District to recover the possession of certain personal property, or the value thereof in case delivery cannot be had, and damages for the alleged unlawful detention; the complaint being in the usual form. The answer denied, generally, each allegation of the complaint, and for a further defense contains the following averments:

"1. That the defendant was the owner on the 1st day of May, 1905, and entitled to the possession of, and ever since has been and now is the owner of and entitled to the possession of, one National Cash Register of the value of \$125.

2. That on or about May 1, 1905, during which time the said National Cash Register was in the possession of one W. M. White, said cash register being situated in the building known as No. 46 Fourth Street, in the City of Portland, County of Multnomah, State of Oregon, the plaintiff wrongfully and unlawfully converted said National Cash Register to his own use, and in place thereof left one certain Hallwood Cash Register, which is mentioned in paragraph 1 of plaintiff's complaint, and that said Hallwood Cash Register is now rightfully in the possession of the defendant, and the defendant holds said Hallwood Cash Register in trust until such time as the plaintiff returns the defendant's aforesaid National Cash Register, which is now held by plaintiff wrongfully and unlawfully."

The reply denied the allegations of new matter in the answer, and the issue having been tried the defendant secured a judgment to review which the plaintiff appealed to the circuit court

for Multnomah County, where the cause was tried by stipulation of the parties, without the intervention of a jury, and the following findings of fact were made, to wit:

"1. That the allegations complained of in plaintiff's complaint are not true, in so far as the plaintiff is entitled to the immediate possession of a certain Hallwood Cash Register of the value of \$170, located and situated at 46 Fourth Street, in the City of Portland, Multnomah County, Oregon.

2. That the defendant was the owner on the 1st day of May, 1905, and entitled to the immediate possession of, and ever since has been and now is the owner of and entitled to the immediate possession of one National Cash Register of the value of \$125.

3. That on or about May 1, 1905, during which time the aforesaid National Cash Register was in the possession of one W. M. White, said cash register being situated in the building known as No. 46 Fourth Street, in the City of Portland, Multnomah County, Oregon, the plaintiff wrongfully and unlawfully converted said National Cash Register to his own use, and in place thereof left one certain Hallwood Cash Register, which is mentioned in paragraph 1 of plaintiff's complaint, and the one for which this action of replevin is brought by the plaintiff, and that said Hallwood Cash Register is now rightfully in the possession of the defendant, and the defendant rightfully and lawfully holds said Hallwood Cash Register until such time as the plaintiff returns defendant's aforesaid National Cash Register, which is now held by the plaintiff wrongfully and unlawfully.

4. That at the time the plaintiff took the defendant's National Cash Register from the possession of W. M. White, and replaced the same by a Hallwood Cash Register, the plaintiff had full knowledge, and knew that the National Cash Register did not belong to the said W. M. White, but that the National Cash Register was owned by and belonged to the defendant.

5. That the plaintiff is not entitled to damages or his costs, but that the defendant is entitled to his costs and disbursements."

From the foregoing findings of fact, the following conclusions of law were made:

"1. That the defendant now is entitled to the immediate possession of the Hallwood Cash Register, and that he holds the same rightfully and lawfully.

2. That the plaintiff cannot recover the possession thereof until the plaintiff returns to the defendant the National Cash Register which he unlawfully withholds the possession of from said defendant."

Based on such findings, judgment was given for the defendant, from which the plaintiff appeals to this court.

AFFIRMED.

Opinion by MR. JUSTICE MOORE.

1. The only deduction announced by the court that is consistent with the averments of the complaint is the conclusion of law that the plaintiff is not entitled to the immediate possession of the demanded property, and, because no findings of fact were made conformable to the allegations of the plaintiff's primary pleading, his counsel insists that an error was thereby committed. Findings of fact made by a court, when an action is tried without the intervention of a jury, are equivalent to special verdicts, and must be based upon, and as broad as the material issues involved: *B. & C. Comp.* § 158; *Moody v. Richards*, 29 Or. 282 (45 Pac. 777); *Daly v. Larsen*, 29 Or. 535 (46 Pac. 143).

2. When a defendant controverts the allegations of a complaint by his answer, and also sets up facts intended to constitute a complete defense to the cause of action stated, he thereby presents a theory of the case that is usually inconsistent with the plaintiff's hypothesis, and the adoption of either legal principle by the court, after a trial of the issue without a jury, necessarily implies a rejection of the theory of the adverse party. If the findings of fact in such a case conform to the proposition, as evidenced by the material controverted averments of either party, and are adequate to uphold the judgment based thereon, the conclusion reached, as the result of a judicial investigation, is sufficient in law, though no findings are made in respect to the theory of one of the parties: *Lewis v. First Nat. Bank*, 46 Or. 182 (78 Pac. 990); *Jennings v. Frazier*, 46 Or. 470 (80 Pac. 1011).

3. When the plaintiff secures a judgment on the trial of an action without a jury, the court's findings of fact must conform

to the controverted material averments of the complaint; but when, in such case, the defendant obtains affirmative relief, the findings of fact must correspond with the essential disputed allegations of new matter in the answer. As the judgment must rest upon the allegations of the complaint or on the averments of new matter in the answer, the findings of fact which correspond with the respective theory assumed as true by the court, after a judicial inquiry, must conform to the pleading which assert such hypothesis, and as the selection of the theory of one of the parties necessarily implies the exclusion of the legal principle deducible from a statement of facts by the adverse party, constituting the cause of action or defense, no necessity exists for making a finding as to the rejected hypothesis, unless so requested for the purpose of reviewing the judgment. In the case at bar, the court having determined that the defendant was rightfully in possession of the Hallwood Cash Register, which he was entitled to hold until the plaintiff returned to him the National Cash Register, which he unlawfully obtained from White, such deduction, though in the nature of a conclusion of law, signifies that the plaintiff is not entitled to the immediate possession of the property in question. The findings of fact, made by the court, conform to the averments of new matter contained in the answer, and as they disprove the plaintiff's right, and no request having been made for findings compatible with the allegations of the complaint, no error was committed, as alleged.

4. It is also maintained by plaintiff's counsel that the averments of new matter in the answer do not constitute a defense to the cause of action stated in the complaint, and hence the findings of fact, based on such allegations, are insufficient to support the judgment. The abstract fails to show that any demurrer to the answer was interposed. The statute declares that an objection to a complaint, on the ground that it does not state facts sufficient to constitute a cause of action, is not waived by failure to demur or answer: B. & C. Comp. § 72. No such provision has been enacted in respect to an answer. In

view of the importance of the question involved, we will consider whether or not the findings of fact uphold the judgment, which might seem tantamount to holding that the section of the statute mentioned was applicable to an answer, a matter which is not intended to be decided. No bill of exceptions accompanies the abstract, and all the facts disclosed are hereinbefore detailed, from which it is impossible legally to determine whether the plaintiff secured the defendant's Register pursuant to a contract entered into with White, or obtained it without the latter's consent; but as the court found that the plaintiff knew that the National Cash Register did not belong to White, but was owned by the defendant, it is fairly inferable that an exchange of registers was effected by White and the plaintiff. An "exchange," as contradistinguished from a "sale," is a contract by the terms of which specific property is given in consideration of the receipt of property other than money: *Cooper v. State*, 37 Ark. 412.

5. What the conditions of the agreement were that was entered into between the plaintiff and White we have legally no means of knowing. An action to recover the possession of specific personal property, though designated in our statute as "claim and delivery" (B. & C. Comp. § 284), is substantially the ancient remedy of replevin: *Kimball v. Redfield*, 33 Or. 292 (54 Pac. 216).

6. The alleged unlawful taking or detention of the goods or chattels of another, which characterizes the pleading invoking the remedy, makes the judicial means of enforcing the right asserted in the nature of an action *ex delicto*, in which a set-off of accounts existing between the parties cannot be settled. In this state a liberal construction has been given to the defendant's pleading in actions of claim and delivery, and it has been determined that whatever demand he has that grows out of the same subject-matter as the plaintiff's claim will be available as a defense, if specifically alleged: *Guille v. Fook*, 13 Or. 577 (11 Pac. 277); *Nunn v. Bird*, 36 Or. 515 (59 Pac. 808).

7. It is inferred from the court's findings that the plaintiff

obtained from White, the defendant's bailee, the National Cash Register, and left in lieu thereof the Hallwood Cash Register. White having only a qualified right to the property, the legal title thereto did not pass by the exchange, and, if the plaintiff desired to recover the possession of the property in controversy, every principle of justice would seem to demand that, as a condition precedent to the exercise of his right, he should return the Register which he received. The plaintiff is, in effect, attempting to rescind his contract whereby he secured possession of the National Cash Register, and, because he obtained no title thereto, he ought to return such Register to the bailor, who has succeeded to White's possessory right to such property, before he is permitted to recover possession of the Register in question. The defendant could probably recover from plaintiff, in a separate action, the National Cash Register, or its value; but if he is obliged to resort to that remedy, and to surrender the possession of the Register which he holds, he would necessarily be liable for the costs and disbursements incurred in this action, which expenses ought not to be imposed upon him, when the loss which he would thus sustain, in consequence of the exchange, is attributable, in part, to the plaintiff's conduct. The demand set out in the answer grows out of, and is connected with, the exchange which forms the basis of the plaintiff's claim, and as the possession of the National Cash Register was obtained by plaintiff with knowledge of the defendant's rights, the former will not be permitted to take advantage of his own wrong, but will be compelled to return such Register as a condition precedent to securing the possession of the demanded personal property: *Latham v. Davis* (C. C.), 44 Fed. 862.

Believing that the findings of fact are adequate, the judgment is affirmed.

AFFIRMED.

Argued 25 July, decided 22 October, 1907.

JOHNSON v. SAVAGE.

91 Pac. 1082.

EXECUTORS AND ADMINISTRATORS—EXPENSES.

1. If a husband's curtesy estate in the property of his deceased wife gives him possession to the exclusion of the administrator, the expenses of fencing the property, insurance on a building thereon, and other expenses for the benefit of the husband, are not chargeable against the estate.

FRAUD—REPRESENTATIONS—RELIANCE—FIDUCIARY RELATIONS.

2. The rule that a person is guilty of negligence in relying on statements or representations of another as a basis of a contract or transaction, does not apply to parties occupying the relation of trust or confidence, such as parent and child, or guardian and ward.

ADMINISTRATORS—FINAL ACCOUNT—VACATION—GROUND.

3. Where a husband was appointed administrator of his deceased wife's estate and fraudulently induced the heirs to advance their money to maintain the same, to acquiesce in the final account without examination, and withhold their claims against the estate, the heirs were entitled to have the final account vacated and the estate reopened.

From Marion: WILLIAM GALLOWAY, Judge.

Suit by Annie M. Johnson against O. G. Savage, to vacate the final settlement of an estate. From a decree in favor of plaintiff, the defendant appeals.

AFFIRMED.

For appellant there was a brief and oral arguments by *Mr. Carey F. Martin* and *Mr. George G. Bingham*.

For respondent there was a brief and oral arguments by *Mr. George E. Chamberlain* and *Mr. Myron E. Pogue*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. Loretta E. Savage died intestate on the 12th day of December, 1902, leaving the defendant, her husband, and the plaintiffs, her daughters by a former marriage, to survive her. At the time of her death she owned and possessed real estate in Marion County valued at about \$17,000, but no personal property, except about \$400 worth of sheep and goats. A portion of said real estate was subject to a mortgage of \$3,000 in favor of the State Land Board. Decedent was also indebted to the Capital National Bank on a promissory note for \$1,000, and plaintiffs claim that she was indebted to them in the sum of

\$1,296 advanced by them to her in her lifetime. On December 29, 1902, defendant was duly appointed administrator of the estate. At the time of the said administration plaintiffs were young ladies, having just arrived at their majority, and, being inexperienced in business affairs, had theretofore wholly depended on defendant and their mother in such matters, and had implicit confidence in defendant. At that time he represented to them that, in order to avoid sacrificing the lands of the estate for payment of decedent's aforesaid debts and expense of administration, and to preserve their interest in said lands, it would be necessary for them to pay such expenses and debts from their own property. Plaintiffs also claim that he advised them that, as soon as the estate was closed, he would release said real estate to them, free from his claim of curtesy therein; that thereafter, by his advice, plaintiffs converted property of their own into cash and deposited the same, to the amount of about \$2,200, in the Capital National Bank, and gave defendant authority to check against it for payment of said \$1,000 note, held by the bank against the estate; that defendant did draw from said account sufficient money to pay said note, \$1,031.30, and \$436.90 additional. The administration of the estate was closed September 8, 1903. Defendant, in his final account of the estate proceedings, does not give a statement of the amount of debts against the estate, nor of the source from which he received the money to pay them, but in said account states that "such claims as do not appear in above final account have been paid by this administrator out of his individual funds, and no claim therefor is made against the estate," thus giving plaintiffs no credit for the amount of their funds applied thereto. This suit was commenced March 14, 1905, for the purpose of opening the said decree of final settlement of said estate, permitting plaintiffs to present their claim against said estate for the advancement of \$1,296 to decedent, and requiring that defendant account for rents and profits of said lands; that he return to plaintiffs \$1,500, used by him in

settling said estate debts, and that he apply the rents and profits of the land in payment of the \$3,000 mortgage until the same is paid. An answer was filed to this complaint, in which defendant claims the realty as tenant by curtesy free from any liabilities for debts of the estate. A reply denying these allegations was filed, and at the trial much testimony was taken upon the issues raised, from which findings were made by the court in favor of plaintiffs, and a decree rendered thereon.

The principle question for our consideration is whether defendant's conduct in the management of the estate, in obtaining the plaintiff's money, and in the final settlement of the estate, as against plaintiffs, was such as to constitute fraud upon them. The final account is a very loose and inaccurate report. It should show all sales of personal property, to whom sold, and the price. Property not sold should be listed and shown to be on hand for distribution. If sheep were killed by dogs, it should be shown by a statement of facts in the report independent of the charge in the statement of the account. It should also show the estate debts, to whom due, and how paid. The evidence in this case disclosed that \$118.75 was expended by the defendant for fencing and for insurance on the hop house, paid from the money of plaintiffs, and this is not mentioned in the report. If defendant's curtesy estate gives him possession to the exclusion of the administrator, as he claims in this suit, then such items are not chargeable to the estate at all, but must be paid by the tenant, which is also true as to the expense of drawing the lease, charged against the estate at \$7.50, which was for defendant's sole benefit.

2. In the final account, the administrator also takes credit for the "present value of the estate," \$16,961.50, viz., \$157.50, increased value of the lands over the appraisement, evidently done to make his account balance, and the error for that amount is in his favor. Nor does he account for the whole of the personal property, nor the increase thereof. These errors could not be taken advantage of now simply as errors in the

account, but it appears that, on account of the fiduciary relations between the defendant and plaintiffs and his efforts to lull them into inaction, and thus prevent them from discovering these errors, it operates as a fraud upon them. It is also clear that he induced the plaintiffs to advance to him \$1,500 with which to pay debts of the estate and other expenses of administration, with the understanding that upon the close of the administration they would come into possession of the real estate free from his curtesy estate. This is corroborated by his own testimony at page 101 of the transcript, where he says: "And she (Mrs. Reed) spoke about it (a deed from defendant to plaintiffs) and wanted to know if I didn't think I had better deed the property over to them. I told her her sister had gone to California, and it would be time enough to talk about it when she came back"—showing that he was encouraging them in the belief that they were to have the land.

3. Upon the same influence and inducement and the fiduciary relations existing between them, and plaintiffs' confidence in defendant's statement that it was all right, they were led to allow the final account to be settled without examination thereof, and without consulting any other adviser in regard thereto. At the time of the death of the decedent, plaintiffs were members of the family and household of defendant and decedent, and after the death of the mother they continued members of the family of defendant until the settlement of the estate, except that they were each absent a short time. At all times the most friendly relations continued; plaintiffs evidently leaving all business relating to the estate entirely to defendant. They acted upon his advice or suggestion in all matters relating thereto, and were ignorant of the legal effect of putting their money into the estate and of their rights therein.

The rule that a person is guilty of negligence in relying upon statements or representations of another as a basis of a contract or transaction does not apply to parties occupying a relation of trust or confidence, such as parent and child, or guardian and

ward: 14 Am. & Eng. Enc. Law (2 ed.), 122, 172; *Baldock v. Johnson*, 14 Or. 542 (13 Pac. 434). By reason of these conditions, plaintiffs have been induced to advance their money to the estate, to acquiesce in the final account without examination, and to withhold their claims against the estate, and have thus been deprived of their rights in regard thereto, resulting in a fraud upon them. Therefore we think the decree of the county court settling the final account should be vacated, and the estate reopened, and plaintiffs given an opportunity to present their claims against the same, and such other proceedings as may be proper in the administration of the estate. As to whether the rents of the realty during the administration should go to the administrator, we deem it unnecessary to decide now, and therefore indicate no opinion upon that question.

The decree of the lower court therefore is affirmed in so far as it directs that the estate be reopened and plaintiffs given a hearing therein.

AFFIRMED.

Argued 23 Oct., decided 17 Dec., 1907, rehearing denied 10 March, 1908.

ROOTS v. BORING JUNCTION LUMBER CO.

92 Pac. 811, 94 Pac. 182.

APPEAL—PARTIES ENTITLED—ACCEPTANCE OF BENEFITS.

1. Where defendant, in a suit to enjoin the cutting of timber on certain land, claims under a contract with plaintiff alleged to give the right to cut all the timber on such land, and the decree enjoins the cutting of timber under 12 inches in diameter, and defendant in the suit appeals, he will not be deemed to have accepted the benefits of the decree so as to preclude an appeal by cutting timber over 12 inches in diameter.

SAME PROCEEDINGS FOR APPEAL—NOTICE—UNDERTAKING—FILING.

2. While it may be unnecessary for plaintiff who takes a cross-appeal to file a separate transcript, yet, where he does not file in the appellate court either his notice or his undertaking within the time for filing the transcript, the court acquires no jurisdiction of the appeal and need not notice a motion to dismiss it.

TRESPASS—PLEADING—SURPLUSAGE.

3. Where a cause of action to recover triple damages for the cutting of timber is defectively framed under Section 348, B. & O. Comp., authorizing such action, but enough is alleged to constitute a cause of action to restrain such cutting as a trespass or the commission of waste, the allegations under the statutes will be treated as surplusage, and the cause retained.

INJUNCTION—WASTE—TRESPASS.

4. Equity will interfere to restrain a trespass or stay waste threatened or being committed, where the acts complained of amount to substantial injury or destruction of the estate, or will cause irreparable damage to the plaintiff, as cutting timber, removing ore, and the like.

APPEAL—REVIEW—DISCRETION OF COURT—PLEADING.

5. The discretion of the court in permitting the filing of an amended reply, after portions of the original reply had been stricken out on motion, will not be disturbed on appeal in the absence of an abuse of discretion, and the failure to file an affidavit showing why such amended reply should be filed is not evidence of an abuse of discretion.

PLEADING—REPLY—DEPARTURE.

6. Where a complaint alleges the unlawful cutting of timber, and the answer justified its cutting by pleading two contracts, setting them out in legal effect, it is not a departure from the cause of action in the complaint to set out the contracts in full in the reply.

SAME—ISSUES, PROOF, AND VARIANCE.

7. Where a complaint, in a suit to restrain the cutting of timber, is framed on the theory of restraining a trespass of land, and the plaintiff's evidence showed, not an unlawful trespass, but a rightful entry and the commission of waste, a motion to dismiss the complaint was properly denied, since the relief sought was substantially the same.

LOGGING—SALES OF STANDING TIMBER—CONTRACTS—CONSTRUCTION.

8. Where, at the time that a contract was entered into, providing for the removal of all "saw timber" from certain land, it is shown that no cord wood was being cut on the land or in the vicinity, and that one of the contracting parties was desirous of getting the timber for his mill and intended to set up the mill near the land, and the other parties sold him the timber with that in view, the term "saw timber" should be construed to exclude the right to cut timber for cord wood, and limited to timber suitable for being manufactured into lumber or other mill products; it not being until after the season of operation of the mill that defendant claimed the right to cut other timber.

JUDGMENTS—RES JUDICATA—ESTOPPEL.

9. An owner of land entered into a contract to sell the timber thereon, and the contract was thereafter assigned. The assignee and the owner entered into an agreement modifying such contract, so that the owner had the right to cut all timber under 12 inches in diameter. The contract thereafter, by successive assignments, came into the hands of a corporation, which brought an action against the owner for the removal of timber by him, and judgment went against him, from which he did not appeal. *Held*, in an action by the owner to restrain the unlawful cutting of timber under 12 inches in diameter by the corporation, that he could show that the contract had been modified in that regard, and that the judgment against him was not an estoppel to set up such modification, though he failed to allege the modification as a defense to that suit.

INJUNCTION—TRESPASS—CUTTING TIMBER—SUFFICIENCY OF EVIDENCE.

10. In an action to restrain the unlawful cutting of timber, evidence considered, and *held* sufficient to show that a contract on which defendant relied had been modified by a subsequent one of which defendant had knowledge.

INJUNCTION—PARTIES.

11. In a suit to enjoin defendant from cutting and removing timber from land belonging to plaintiff, one who was in no way interested in the subject-matter of the litigation, and whose connection with the matter was only be-

cause defendant's interest in the contracts in controversy were secured through him, was not a necessary party.

ABATEMENT—OTHER SUIT PENDING.

10. That plaintiff commenced an action at law against defendant for a violation of a contract giving defendant the right to cut and remove certain timber, and also brought a suit in equity to reform one of the contracts, and that such litigation is pending and undetermined, does not prevent an action to restrain the further cutting of timber in violation of the contract.

From Clackamas: THOMAS A. McBRIDE, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a suit by J. W. Roots against the Boring Junction Lumber Company to enjoin and restrain the defendant corporation from cutting and removing cord wood from land belonging to plaintiff. On June 28, 1902, plaintiff contracted to sell one O. A. Palmer all the "saw timber" over nine inches in diameter on certain lands belonging to him including the S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 31, township 1 S., range 4 E., in Clackamas County, for \$10 an acre, to be paid in installments; the last payment falling due March 1, 1904. The timber was to be removed within five years from date of contract, at the expiration of which time Palmer was to surrender to plaintiff possession of the premises, and in the meantime relinquish to him any 40 acres, as soon as he removed the timber therefrom; and plaintiff reserved the right to take any timber except saw timber.

On July 21, 1902, plaintiff and Palmer entered into another contract, by which plaintiff sold to Palmer "all the timber" on the N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 6, for \$1,250, payable in installments, and allowed him five years to remove all the timber on the south side of a certain creek running through such land, and six years to remove that on the north side of said creek. It was stipulated and agreed, as part of the contract, that land from which the timber had been removed should be "turned over" to plaintiff for his use, subject to certain rights of way for roads, and that Palmer "will take and remove all the timber that he wants as his regular work of removing the timber progresses, and that he will not leave portions of timber to be removed at any later date." In case he

failed to comply with the contract, he was to forfeit all his rights thereunder, and the timber remaining on the land was to be and remain the property of plaintiff.

At the time these contracts were entered into, Palmer was the owner of a small mill, which he contemplated moving and setting up near the land in question. He commenced moving his mill soon after or about the time the contracts were executed, but before he got it into operation became financially embarrassed, and late in the fall of 1902 assigned and transferred it, together with all his interest in the two contracts mentioned, to Fred S. Morris, with plaintiff's consent. After such assignment, and on December 24, 1902, Morris and plaintiff entered into an agreement by which the terms of the above-mentioned contracts were modified, so that Morris was to pay to plaintiff \$20 an acre, as stumpage, for all the timber authorized to be taken from section 31 by the contract of June 28, 1902, in lieu of the purchase price stipulated in such contract, and plaintiff was to have the right to cut all the timber under 12 inches in diameter on the land described in both the contract of June 28 and that of July 21, 1902, with the right to enter upon any of the lands mentioned in such contract, as soon as Morris removed the timber, which he was authorized to take thereunder. There were some other changes in the original contract not material here, except it was agreed that they were not to be assigned to any person, except Palmer, without plaintiff's consent.

On December 29, 1902, Morris and Palmer entered into an agreement, which, after reciting the previous assignment by Palmer to Morris of the two Roots contracts, and the conveyance to Morris of certain real estate, stipulated that, in consideration of such conveyance and assignment, Morris assumed and agreed to pay certain indebtedness of Palmer, including the purchase price of timber mentioned in the two contracts, and to put Palmer in possession of the sawmill property, and give and grant to him "the right to cut timber from any and all of said lands; the said timber to be cut as authorized by the

said two agreements, and as permitted by that certain other agreement entered into by the said Morris and the said J. W. Roots and wife, dated December 24, 1902, and it being understood that the said agreement between said Roots and wife and said Morris is personal to said Morris, and that Palmer may avail of the privileges conferred by said agreement only so long as he has possession of said property, under the said Morris and the terms hereof."

On February 19, 1903, Palmer sold to one Linton an undivided one-half interest in his sawmill and logging business and contracts, and Linton agreed "to assume one-half the contract existing between O. A. Palmer and Fred S. Morris." On March 17, 1903, Palmer and Linton organized the defendant corporation and transferred to it the sawmill and business, together with the contracts referred to, and it likewise "assumed and agreed to carry out the contract existing between O. A. Palmer and Fred S. Morris." The corporation thereupon took possession of the mill and logging business, and continued to operate the mill and take logs and timber from the lands of plaintiff described in the contracts of June 28 and July 21, 1902, until about the 1st day of March, 1905, when it shut down the mill, disposed of its logging outfit, and ceased its milling and logging operations. Soon thereafter it commenced to cut and manufacture cord wood from the timber remaining on the lands described in the contracts referred to, whereupon a dispute arose between the parties to this suit concerning their respective rights: plaintiff contending that defendant had exhausted its rights under the contract of June 28, 1902, and therefore was not entitled to take any more timber from section 31, and that under the contract of July 21, 1902, as modified by the Morris contract of December 24, 1902, defendant was entitled to no timber from section 6, except "saw timber," 12 inches and over in diameter, while defendant contended that it had a right to take from section 31 any timber not under 9 inches in diameter, and to manufacture it into cord wood or sawmill product, as it might see proper, and that it had a right to take all the timber

on the land described in section 6, regardless of its size, and whether or not it could be manufactured into lumber or other sawmill product.

Several actions and suits arose out of these controversies, on account of matters arising prior to July 1, 1905, and on November 15, 1905, plaintiff commenced this suit to enjoin and restrain defendant from further cutting or removing cord wood from his lands, and for damages for wood cut since the first of July previous. The complaint, after alleging the incorporation of defendant, avers: that, at all the times therein mentioned, plaintiff was and still is the owner of the S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 31, township 1 S., range 4 E., and N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 6, township 2 S., range 4 E. of W. M., in Clackamas County; that between the 1st day of July, 1905, and date of filing the complaint, defendant wrongfully and unlawfully, and without authority from plaintiff, entered upon the lands above described and did wrongfully and unlawfully cut and remove therefrom, and convert to its own use, about 2,000 cords of wood, belonging to plaintiff, of the reasonable value of \$1,000, to his damage in that sum; that the wood was cut and removed by defendant without any right or license so to do, and on account thereof plaintiff is entitled to treble damages as provided in Section 348, B. & C. Comp.; that there yet remains on such premises a large amount of growing trees and timber, suitable for cord wood, and of great value to plaintiff; that defendant has a large force of men and teams engaged in cutting and hauling the trees and timber from such premises and converting the same into wood, in the aggregate amount of from 500 to 600 cords per month, and intends to and will, unless restrained by an order of the court, continue to cut and haul such timber, and thereby injure and destroy the value of plaintiff's estate, and lead to oppressive litigation and multiplicity of suits; that defendant has no property, real or personal, in this State or elsewhere, out of which a judgment could be made for damages complained of; that it is now, and has been for several years last past, insolvent; that, notwithstanding the

actions theretofore brought in this court and now pending, defendant intends to and will employ every dilatory plea and device to postpone the hearing of said actions until all the timber and wood on the premises referred to is cut and removed, and the proceeds converted to defendant's use and benefit, to the great and irreparable loss, injury, and damage of plaintiff; that plaintiff has no plain, speedy or adequate remedy at law—wherefore he prays that he may have judgment against defendant for treble the damages sustained, and an injunction restraining it from further cutting or removing wood from the land described in the complaint.

Upon the filing of the complaint, a preliminary injunction was issued, enjoining and restraining defendant from trespassing upon the premises described in the complaint, or from cutting or removing wood or timber therefrom, until further order of the court. On November 18, 1905, defendant filed an answer, in which it admits that plaintiff is the owner of the lands described in the complaint, but denies that he is or has since July 21, 1902, been the owner of any of the timber on the land described as being in section 6; or that he has been the owner of any of the saw timber over nine inches in diameter on the land located in section 31, since the 28th of June, 1902.

For a further and separate answer to that part of the complaint charging trespass or waste on the land situated in section 6, it was averred that on July 21, 1902, plaintiff, for a valuable consideration, sold all the timber on such land to O. A. Palmer, with full right to remove all the timber on the south side of the creek that runs through the land, within five years from date, and on the north side of the creek within six years; that Palmer sold and assigned a one-half interest in the contract and timber to A. J. Linton, with the knowledge and consent of plaintiff; that on March 17, 1903, Palmer and Linton sold and assigned the contract and timber to defendant corporation with the full knowledge and consent of plaintiff, and ever since such date defendant has been the owner of all such timber and engaged in disposing of it in the regular course of its business; that

Palmer and his assignee have in all things complied with the contract between him and plaintiff; that on or about February 1, 1905, a dispute arose between plaintiff and defendant as to the ownership of the timber on section 6, and to settle such dispute defendant commenced an action at law against plaintiff in the Circuit Court of the State of Oregon, for Multnomah County, in which it alleged the making of the contract of July 21, 1902, between Palmer and Roots, the assignee thereof, to defendant corporation, its ownership of all the timber on the land referred to, and that on or about May 1, 1904, plaintiff, without its permission, wrongfully went upon such land and cut and removed therefrom about 40 cords of wood, and converted the same to his own use, to its damage in the sum of \$20, and prayed judgment against him for that amount; that plaintiff answered the complaint denying each and every allegation thereof; that upon the issues thus joined the action came on regularly for trial on March 8, 1905, before the court without intervention of a jury; that the court found the allegations of the complaint as to the ownership of the timber to be true, and that on or about May 1, 1904, plaintiff wrongfully went upon the land and cut and removed therefrom about 20 cords of wood from timber belonging to defendant of the value of \$10, and rendered judgment against him for that sum, together with costs and disbursements; that no appeal has been taken from such judgment, and it has become final; that by reason thereof plaintiff is now estopped to allege or claim ownership or title to any of the timber on the land described in section 6. The answer further alleges that the present suit, so far as it relates to this particular tract of land, was begun maliciously for the purpose of damaging defendant and to break up its business; that it has a large number of men and teams employed to cut and market the timber, and that it has and will suffer a very large amount of damage if the preliminary injunction is continued. It then alleges the commencement of a suit by plaintiff against defendant to reform the contract of July 21,

1902, and that such suit is still pending and undetermined; and also, the commencement of an action at law on March 30, 1905, by plaintiff against defendant, and that such action is still pending.

For a further and separate answer to that part of the complaint charging trespass or waste on the land described in section 31, it is alleged that on June 28, 1902, for a valuable consideration, plaintiff sold to O. A. Palmer all saw timber on such land over nine inches in diameter, with the right to remove the same in five years from date; that Palmer sold and assigned a one-half interest in the contract and timber to Linton, and on March 17, 1903, he and Linton sold and assigned the same to defendant company, with the full knowledge and consent of plaintiff, and defendant has been ever since that date, and is now, the owner of the timber with the full right to remove the same; that defendant has paid for all the saw timber on such premises over nine inches in diameter, and is now engaged in cutting and removing the same in the regular course of its business, and does not intend to cut and remove any other timber than such as is described in the contract referred to; that plaintiff has brought numerous actions against defendant for treble damages, under Section 348, B. & C. Comp., for cutting this saw timber, and defendant has been promptly defending such actions, and has not unnecessarily delayed the same; that plaintiff brought this suit for the sole purpose of maliciously inflicting damages upon defendant; that it is a solvent corporation with ample funds to pay its debts; that it has a large force of men and teams engaged in cutting and removing timber in section 31, in the regular course of its business; and that it will be greatly damaged if enjoined and restrained from proceeding with such work.

To this answer plaintiff filed a reply, in which he denies that by the contract of July 21, 1902, he sold to Palmer all the timber on the land in section 6, or any timber on said land, except under and by virtue of a certain contract in writing of that date, the original of which is annexed and made a part of

the answer, and, by certain amendments and modifications thereto, that the litigation set out in defendant's answer between it and plaintiff in the circuit court of Multnomah County did not relate to any timber or wood involved in the present suit. It also denies that plaintiff sold to Palmer all the saw timber on land described in section 31 over nine inches in diameter, or of any diameter, except under and by virtue of a certain contract and bill of sale dated June 28, 1902, which is annexed and made a part of the reply, and certain amendments thereto. For a further and separate reply, it is alleged that on the ——— day of ———, 1902, Palmer for a valuable consideration, sold, assigned and transferred all of his right, title and interest in the two contracts, referred to in defendant's answer, of dates, respectively, June 28 and July 21, 1902, to Fred S. Morris, which agreement was assented to by plaintiff, and Morris is now the owner of the contracts and all interest therein; that after such assignment, and while Morris was the owner of such contract and all interest therein, he made and entered into a contract in writing with plaintiff, a copy of which is annexed and made a part of the reply, by which certain changes, amendments, and modifications were made in the contracts between Palmer and plaintiff; and that all wood and timber described in plaintiff's complaint, and to which he claims ownership, is his property under and by virtue of conditions, reservations and exceptions set out in the contracts of June 28 and July 21, 1902, as modified by the Morris contract of December 24, 1902, and was expressly reserved to plaintiff under and by virtue of such contracts.

On November 18, 1905, the preliminary injunction was vacated by the trial court, so far as it relates to land in section 6, and continued in force as to the other land described in the complaint. On motion of defendant certain parts of the reply were thereafter stricken out, and defendant permitted by the court to file an amended reply, which is substantially the same as the original, except that it alleges that defendant's interest in the contracts or agreements of June 28 and July 21, 1902,

were acquired subsequent to and subject to the modifications thereof as made by Morris and plaintiff on December 24, 1902; that under and by virtue of the contract of June 28, 1902, as so modified, plaintiff sold only the saw timber on the land described in section 31, over 12 inches in diameter, and all timber under that diameter and such as was unsuitable for saw logs was to remain his property; that by such contract Palmer and his assignee agreed to relinquish and surrender to plaintiff any 40 acres of land described in the agreement as soon as the timber was logged off, and the plaintiff reserved the right to enter on any of the land described in the contract, and clear, slash, fence, or grub and remove any or all timber except saw timber; that long before July 1, 1905, defendant removed all saw timber from the land in section 31, and surrendered the possession thereof to plaintiff; that the only timber left on the land after it was logged off by defendant was that under 12 inches in diameter, or such as was decayed or unfit for saw timber, and which defendant left on the premises as its logging operations progressed; that under the contract of July 21, 1902, and the subsequent modifications thereof by the agreement between plaintiff and Morris of date December 24, 1902, plaintiff only sold the saw timber over 12 inches in diameter on the land in in section 6, and such contract contained a provision that Palmer and his assignee "will take and remove all the timber that he wants as his regular work of removing the timber progresses, and he will not leave portions of the timber to be removed at any later date"; that long before the 1st day of July, 1905, defendant logged over the premises in section 6 and removed all the saw timber thereof and such as it wanted under its contract, and thereupon surrendered possession thereof to plaintiff; that all the cord wood and timber described in plaintiff's complaint, cut by defendant on section 6, was cut out of timber under 12 inches in diameter and out of timber unsuitable for saw logs, all of which was reserved to plaintiff under the agreements referred to; that after the land was logged off by defendant, and the saw timber removed therefrom, and after

it had been surrendered to plaintiff, defendant again re-entered and cut and hauled away the cord wood mentioned in the complaint, which was and is the property of plaintiff under and by virtue of his ownership of the land and the provisions of the contracts mentioned.

Upon the issues thus joined the cause was tried, and after a personal inspection of the premises, the court held and found that the words "saw timber," as used in the agreement of June 28, 1902, under which defendant corporation claims the right to timber on section 31, was intended to and did mean timber fit and suitable for sawing into lumber for commercial purposes; that prior to the 1st day of July, 1905, defendant took all such timber from the land described in the contract, except from a strip about 11 rods wide extending across the east end of the S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of said section; that the contract of July 21, 1902, between plaintiff and Palmer, was so modified, after the assignment thereof to Morris by the contract of December 24, 1902, between plaintiff and Morris, that nothing passed to the grantee under such contract, except timber on the land therein described, 12 inches in diameter and upwards; that plaintiff reserved all the timber under that size; that defendant had succeeded to the rights of Morris under such contract and was entitled to take thereunder all the wood and timber 12 inches in diameter and upwards, but no other; that between July 1 and November 15, 1905, defendant entered upon the lands described in the complaint and from the timber on section 31, and from trees and timber less than 12 inches in diameter on section 6, cut and hauled away about 1,000 cords of wood, to plaintiff's damage in the sum of \$350; that it cut on section 31 and left on the ground a large quantity of trees and wood, the property of plaintiff; that it also cut and converted into cord wood on section 6, and mingled with other wood which it had a right to cut, a number of trees of less than 12 inches in diameter, which were the property of plaintiff, to his damage in the sum of \$30; that the cutting down and hauling away of trees and timber on section 6, less than 12 inches in diameter.

would greatly impair and destroy the value of the estate; that defendant claims the right and was engaged, at the time of the commencement of the suit and the rendition of the decree, in cutting and carrying away all the timber on section 6, and all trees and timber on section 31 over 9 inches in diameter, and, unless restrained by order of the court, will cut and remove all such timber and trees, to plaintiff's great and irreparable damage; that on the 1st day of July, 1905, plaintiff was, and ever since has been, entitled to all the trees and timber on section 31 and the wood cut by defendant and remaining thereon, except the saw timber in the strip 11 rods wide above mentioned, and of all timber less than 12 inches in diameter on section 6; that defendant has the right to take from the land in section 6 the wood already cut by it and all timber and trees of the diameter of 12 inches and upwards, at any time during the life of the contract, but that it has no right to take any other timber from such land, and no right to take or remove any timber or wood whatever from section 31, except saw timber from the strip 11 rods wide previously mentioned, and that plaintiff was entitled to a judgment against defendant for \$350 for damage sustained by its wrongful cutting and removing timber belonging to him, since the 1st of July, 1905. A decree was thereupon entered accordingly, and defendant perpetually enjoined and restrained from taking any wood or timber from section 31, and any timber from section 6, less than 12 inches in diameter. From this decree, defendant appeals.

AFFIRMED.

For appellant there was a brief and oral argument by *Mr. Ralph R. Duniway*.

For respondent there was a brief and oral arguments by *Mr. Harvey E. Cross* and *Mr. Charles H. Dye*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. By the decree from which this appeal is taken, the defendant was enjoined and restrained from cutting or removing any timber or wood, whether cut or otherwise, from section 31, regardless of its size, quality or dimensions, except the saw

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timber from a strip 11 rods wide along the east end of the S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of such section, and it was also enjoined and restrained from cutting or removing any trees or timber from section 6 under 12 inches in diameter; but it was authorized and permitted to take, at any time during the life of the contract, all the trees or timber on section 6, 12 inches and upwards in diameter, whether suitable for manufacturing into lumber or not. After the rendition of the decree, defendant continued to cut and manufacture, into cord wood, trees 12 inches and upwards in diameter from the land mentioned. Plaintiff now moves to dismiss defendant's appeal on the ground that, by thus continuing to cut and remove wood, it accepted the benefits of the decree, and therefore cannot appeal therefrom. The law is well settled that a party cannot claim the benefit of a judgment or decree and at the same time appeal from it. The right to appeal and to enjoy the fruits of a judgment or decree are totally inconsistent, and an election to take one course is a renunciation of the other: *Moore v. Floyd*, 4 Or. 260; *Portland Construction Co. v. O'Neil*, 24 Or. 54 (32 Pac. 764); *Bush v. Mitchell*, 28 Or. 92 (41 Pac. 155). But the defendant in cutting and removing wood from section 6, was not acting under the protection of the decree or by virtue of any rights given it thereby, but under a contract with the owner of the land. The plaintiff sought by this suit to enjoin it from taking any trees or timber under 12 inches in diameter and any timber over that size, except such as was suitable for being manufactured into lumber. The court granted the relief prayed for as to trees under 12 inches in diameter, and refused it as to all over that size, thereby leaving defendant to proceed, so far as such timber was concerned, as if no suit had been brought.

2. It is not necessary to consider what defendant's situation would have been if plaintiff had appealed from that portion of the decree refusing to enjoin it from taking or cutting such timber, and given a stay bond. The record, however, does not disclose that the plaintiff did so appeal, although it was said at the argument that, after defendant's appeal, plaintiff took a

cross-appeal, and a motion is on file to dismiss such cross-appeal. No notice or undertaking on such appeal has been filed in this court, and therefore the appeal, if taken, has never been perfected. While it may not be necessary where both parties to a judgment or decree appeal, to file separate transcripts, it certainly is essential that the notice and undertaking on an appeal shall be filed within the time provided by law in which to file a transcript, or otherwise this court does not acquire jurisdiction of the appeal. Since the plaintiff has not complied with this rule, it is unnecessary to consider the motion to dismiss his appeal, or any of the provisions of the decree of which he complains.

3. We pass then to a consideration of the questions arising on defendant's appeal. It is insisted at the outset that the court is without jurisdiction, because this is a proceeding, under Section 348, B. & C. Comp., to recover treble damages for the wrongful and unlawful cutting of timber on plaintiff's land. The reference in the complaint to Section 348 and the allegations attempting to state a cause of action under such section may be treated as surplusage, as was done by the trial court, and enough remains to constitute a cause of suit for injunction to restrain a trespass or the commission of waste.

4. It is alleged in the complaint that plaintiff is the owner of certain described lands, and that there is growing and standing thereon a large quantity of trees and timber suitable for cord wood of great value to plaintiff; that between certain dates, defendant wrongfully and unlawfully entered upon such lands and cut and removed therefrom 2,000 cords of wood; that it has a large force of men and teams engaged in cutting and hauling timber and wood from such premises, and threatens to and will, unless restrained, remove the wood and timber therefrom, to the irreparable injury of plaintiff's estate, and to his great damage. These are facts sufficient for injunctive relief. for the rule is firmly established in this state that a court of equity will interfere to restrain a trespass or stay waste, threatened or being committed, when the acts complained of go to the

substantial injury or destruction of the estate or will cause irreparable damage to the plaintiff, such as cutting timber, removing ore, and the like: *Allen v. Dunlap*, 24 Or. 229 (33 Pac. 675); *Mendenhall v. Harrisburg Water Co.*, 27 Or. 38 (39 Pac. 399); *Sheridan v. McMullen*, 12 Or. 150 (6 Pac. 497); *Smith v. Gardner*, 12 Or. 221 (6 Pac. 771: 53 Am. Rep. 342); *Elliott v. Bloyd*, 40 Or. 326 (67 Pac. 202). *Allen v. Dunlap*, 24 Or. 229, was a suit to enjoin a trespass on a mining claim. Objection was made to the jurisdiction of the court, but Mr. Justice LORD says:

"The general rule that a court of equity will refuse to take jurisdiction and award even a temporary injunction, in cases of a mere trespass, is conceded; but there is an established exception in cases of mines, timber and the like, in which an injunction will be granted to restrain the commission of acts by which the substance of an estate is injured, destroyed or carried away. In such case, the injury being irreparable or difficult of ascertainment in damages, the remedy at law is inadequate."

Mendenhall v. Harrisburg Water Co. 27 Or. 38 (39 Pac. 399), was a suit to enjoin the defendant from taking possession of land belonging to plaintiff and cutting timber and enlarging a ditch thereon, and the court sustained the suit and granted the injunction. In that case Mr. Justice MOORE, after quoting from *Smith v. Gardner*, 12 Or. 221 (6 Pac. 771: 53 Am. Rep. 342), said:

"In the case at bar the evidence shows that the defendant threatened to widen the ditch beyond the limits of its right of way, and throw the material taken therefrom upon plaintiff's land; to construct and maintain a dam, the backwater from which would destroy the ford used by the plaintiff and her husband; and to cut and destroy the timber growing along the banks of the ditch outside of the right of way. The injury complained of is more than a mere trespass; it goes to the destruction of plaintiff's estate."

Sheridan v. McMullen, 12 Or. 150 (6 Pac. 497), was a suit by a landlord against his tenant to enjoin him from cutting timber on leased premises. The jurisdiction of a court of

equity was challenged on the ground that plaintiff's remedy was by an action at law for damages, but Mr. Justice LORD says:

"The remedy by injunction to stay waste, threatened or being committed, has been so often asserted, and is now so fully established, that the jurisdiction is seldom questioned. It has almost entirely superseded the common-law action of waste, and in a great measure taken the place of the action on the case for damages, ordinarily resorted to whenever any remedy is sought at law, because of their inadequacy in many cases, and the remedy by injunction is so much more expeditious and complete."

In support of this position, the learned justice cites *Fleming v. Collins*, 2 Del. Ch. 230, in which it was held that the cutting of timber is an injury of irreparable nature and remediable in equity, by whosoever committed, and that equity, having jurisdiction to restrain waste, will decree an account and satisfaction for the waste committed. He also refers to and quotes approvingly, Judge STORY's summary of this equitable jurisdiction, in which he says:

"The inadequacy of the remedy at common law, as well to prevent waste as to give redress for waste already committed, is unquestionable, and there is no wonder that the resort to the court of law has in a great measure fallen into disuse. * * The remedy by a bill in equity is so much more easy, expeditious and complete, that it is almost invariably resorted to. By such a bill not only may future waste be prevented, but, as we have already seen, an account may be decreed and a compensation given for past waste: 2 Story, *Equitable Juris.* § 917.

In *Livingston v. Livingston*, 6 Johns. Ch. (N. Y.) 497 (10 Am. Dec. 353), Chancellor KENT says: "This protection (by injunction) is now granted in case of timber, coals, lead ore, quarries, etc." *Elliott v. Bloyd*, 40 Or. 326 (67 Pac. 202), was a suit to enjoin defendant from taking and removing timber from land belonging to plaintiff not included in a contract between the parties, by which plaintiff sold to defendant certain described timber on such land. In that case, also, the jurisdiction of a court of equity was questioned; but it was held that under the settled rules of equitable jurisdiction the court

would interfere to restrain the threatened waste. This same principle was announced and applied by this court in other cases cited.

5. It is also contended that the court erred in permitting plaintiff to file an amended reply, after portions of the original reply had been stricken out on motion; but this was a matter resting within the sound discretion of the trial court, and its judgment thereon will not be disturbed on appeal, unless it appears there was an abuse of such discretion. Nor does the fact that plaintiff's application to file such amended pleading was not supported by an affidavit showing why he should be permitted to do so. The court allowed his application, and before its ruling can be disturbed on appeal, it must affirmatively appear that it erroneously exercised its discretion. Where a court refuses to permit an amended pleading to be filed, its judgment likewise will not be disturbed, unless it appears from a supporting affidavit, or otherwise, that it was an abuse of discretion to deny such application: *Garrison v. Goodale*, 23 Or. 307 (31 Pac. 709).

6. It is also insisted that the reply as filed constituted a departure from the cause of suit set up in the complaint. The defendant justified its right to cut or remove the timber or wood in controversy under and by virtue of two certain contracts, which it claims to have with plaintiff, but which are not set out in the answer, except in legal effect. To meet this defense, plaintiff by his reply pleads the terms of these contracts for the purpose of showing that the timber or wood in question did not come within the provisions thereof. The reply, therefore, is not a departure from the complaint or a new assignment of a cause of suit. It would probably have been better pleading if plaintiff had referred to, and set out, these contracts in his complaint, and then averred that the wood and timber, which he says defendant is wrongfully and unlawfully taking and threatening to take from his land, did not come within the terms of the contract; but it was not absolutely essential for

him to do so, nor did the making of such averments in the reply substantially change the cause of suit.

7. It is claimed that defendant's motion to dismiss the suit, made at the close of plaintiff's testimony, should have been sustained, because the evidence shows that defendant was not, in fact, a trespasser, but had a right, under its contracts with plaintiff, to enter upon the property in controversy for the purpose of cutting and removing certain timber, and that it is liable, if at all, for waste in cutting timber to which it was not entitled under such contracts, and therefore the plaintiff's remedy should have been by suit to restrain waste, and not to enjoin a trespass. Technically there is a difference between "waste" and "trespass." "Waste" is some unauthorized act which goes to the injury or destruction of an estate committed by one in the rightful possession thereof, while "trespass" is the act of a mere intruder. But, as we have seen, there is no substantial distinction, so far as the remedy is concerned. The law gives for trespass, by which the substance of an estate is injured or destroyed, and which cannot be adequately compensated in damages, the remedies for waste (30 Am. & Eng. Enc. Law (2 ed.), 258), and therefore, while in a technical sense the appropriate remedy for the plaintiff, under the facts disclosed by the testimony, would have been a suit to restrain waste, rather than a suit to enjoin a trespass, the relief sought is substantially the same, and the technical form of the pleading could have worked no injury to the defendant.

8. This brings us to the merits. So far as the controversy concerning the timber on section 31 is concerned, the result depends upon the construction of the word "saw timber," as used in the contract between plaintiff and Palmer of June 28, 1902. The court below found that prior to July 1, 1905, defendant had taken from such land all the timber fit for lumber, except that upon a strip about 11 rods wide extending across the east end of the land, and in this view we concur, after a careful reading of the testimony. The evidence shows that the greater part of the land was "logged off" during the winter of

1902-03, and the remainder the following season; that all the timber suitable for milling purposes was taken, and defendant quit logging and removed its engines and logging appliances, and plaintiff took possession of the premises and began cutting cord wood thereon; that about the 1st of March, 1905, defendant, finding its lumber business unprofitable, shut down its mill and soon thereafter re-entered and began cutting cord wood from tops of trees left on the ground during its logging operations, and from "wind falls" and unsound timber rejected by the loggers; that up to the time of the commencement of this suit it had taken and removed about 700 cords, and was then engaged in removing wood at the rate of 40 or 50 cords a day. Defendant claims that it was entitled, under its contract with plaintiff, to take all the timber under nine inches in diameter, whether suitable for lumber or not. It is common learning that the construction to be given to a contract or agreement must have reference to the time and circumstances under which it was made. When so construed, there can be no reasonable doubt as to the meaning of the word "saw timber" as used in the contract between plaintiff and Palmer. At the time the contract was made, no cord wood was being cut on the land or in the vicinity; nor was any such use of the timber contemplated by either of the parties. Palmer was the owner of a sawmill which he intended setting up on land adjoining or near to the tract in question. He was desirous of acquiring timber for use at his mill, and plaintiff was intending to sell him timber for that purpose. Neither party was contracting with any other end in view, and when they used the word "saw timber," as qualifying or describing the character of timber sold and purchased, they necessarily intended it to limit the grantee's right to timber suitable for being manufactured into lumber or other mill product. And this is the construction put upon the contract by the grantee. After the timber suitable for milling purposes had been removed from the land, defendant ceased its operations and removed its logging appliances, and it was not until it shut down its mill that it made any claim or con-

tention that it had a right to take any timber other than such as was suitable for milling purposes. Having thus unmistakably indicated by its conduct what it understood by the term "saw timber," it cannot now be heard to insist that another interpretation be placed upon these words: *Kaul v. Wend*, 203 Pa. 586 (53 Atl. 489); *Dexter v. Lathrop*, 136 Pa. 565 (20 Atl. 545).

9. Two questions arise in the consideration of the controversy over the timber on the remainder of the land described in the complaint: First, whether the judgment in favor of defendant, in the action brought by it against plaintiff in the circuit court for Multnomah County, to recover the value of cord wood cut by him on the land, is a bar or an estoppel to this suit, and, if not, whether defendant is bound by the terms of the contract of December 24, 1902, between plaintiff and Morris, modifying the contract of July 21, 1902, as to limit the rights of the purchaser to timber 12 inches and upwards in diameter. A reference to the pleadings and findings in the former action is necessary to an intelligent understanding of the question involved in the plea of former adjudication. The complaint in such action, after averring the incorporation of the Boring Junction Lumber Company, alleges that on July 21, 1902, Palmer purchased of Roots all the timber on the land in question, and paid him therefor, and subsequently sold and transferred all his rights under such contract to the company, and it is, and during all times mentioned in the complaint has been, the owner of such timber; that on or about the 1st day of May, 1904, Roots, without its permission, went upon the land, cut and converted to his own use, about 40 cords of wood from timber then belonging to it, of the reasonable value of 50 cents a cord, and prayed judgment for that amount. The answer is a general denial of the allegations of the complaint, and the findings of fact are substantially a copy of such allegations, except as to the amount of wood cut and removed by Roots.

The law is well settled that, when a fact has been once litigated in a court of competent jurisdiction, the judgment rendered thereon is, as a plea, a bar, or, as evidence, conclusive

between the same parties upon the same matter directly in question in another action. But a judgment in one action is a bar or an estoppel in another action between the same parties upon a different claim or demand, only as to the point actually litigated and determined, and does not extend to questions which might have arisen and been litigated: *La Follett v. Mitchell*, 42 Or. 465 (69 Pac. 916; 95 Am. St. Rep. 780). Thus, in an action for rent under a building contract, the defendant pleaded a subsequent agreement changing the tenancy into one from year to year, and its determination by notice to quit. The plaintiff replied that he had recovered judgment in a former action against defendant for rent under the same agreement, which had accrued after the alleged determination of the tenancy, and in which the defendant did not set up the defense pleaded in the second action. The replication was held bad on demurrer, and Mr. Justice WILLIS said: "It is quite right that a defendant should be estopped from setting up in the same action a defense which he might have pleaded, but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up a defense in a second action because he did not avail himself of the opportunity of setting it up in the first action": *Howlett v. Tarte*, 10 C. B. N. S. 813. So, also, a judgment in favor of a county, in an action to recover on certain coupons attached to bonds issued by the county, does not estop the plaintiff in such action from showing, in an action on other coupons attached to the same bonds, that he acquired such coupons and bonds for value before maturity; that question not having been adjudicated in the former action: *Cromwell v. County of Sac*, 94 U. S. 351 (24 L. Ed. 195).

There is a difference between the effect of a judgment as a bar or estoppel in another action between the same parties upon a different claim or demand, and in a second action upon the same claim or demand. In the latter case, the judgment, if upon the merits, is an absolute bar, and conclusive not only as to every matter that was actually litigated, but also to every

matter that might have been litigated. But in the former the judgment is a bar or estoppel only as to those matters that were directly in issue and determined. Now, applying these principles to the case at hand, its solution is not difficult. The case of the lumber company against Roots was upon a different claim or demand from the one now in suit. It was an action in the nature of trespass to recover damages for taking timber belonging to the company. As an inducement to its right to recover, the company alleged the purchase by Palmer from Roots of all the timber on certain described lands on July 21, 1902, the subsequent transfer by Palmer of his rights under the contract to defendant, the entry of Roots on such land, and the cutting and removal of 40 cords of wood by him from the timber belonging to the company. These averments were denied by Roots. The only issues, therefore, presented by the pleadings or tried by the court, were the validity of the contract of July 21, 1902, the assignment of such contract to defendant, its legal effect, and the amount of wood cut and removed by Roots. Upon these questions the judgment is conclusive, but there was no issue as to any subsequent modifications of the contract and no findings upon that question. Roots did not set up any such defense, and is not concluded by the judgment because he might have done so but did not. "It is not believed," says Mr. Justice FIELD, in *Cromwell v. Sac County*, 94 U. S. 351 (24 L. Ed. 195), that there are any cases going to the extent that, because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause because it might have been determined in the first action." The judgment in the former action was, therefore, in no way a bar to the present suit, since the point now made, that the contract of July 21, 1902, between

Palmer and Roots, was subsequently so modified that the right of the grantee and his assignee to cut timber, was confined to that 12 inches and upwards in diameter.

10. The other question is one of fact. The defendant claims that it is not bound by the contract between Morris and Roots, of December 24, 1902, and at the time it acquired its rights to the timber in controversy, it had no knowledge of such contract or the terms thereof. But this position is not supported by the testimony. Some time prior to December 24, 1902, Palmer assigned and transferred to Morris his mill property and all his rights under the contracts with Roots of June 28 and July 21, 1902, and on the day named, Morris and Roots entered into a written agreement, in which it was stipulated that Morris would pay Roots \$20 an acre in lieu of the compensation mentioned in the contract of June 28th for the timber he was authorized to cut on the land in section 31, and that Roots "shall have the right to cut all the timber under 12 inches in diameter on land described in said contract of July 21, 1902. as well as the land described in the contract dated June 28, 1902," and the right to "enter upon any of the land described in said two agreements and cut the timber thereon authorized by him to be cut," as soon as Morris shall have cut and removed the timber to which he is entitled. Four days later, Morris retransferred the mill property to Palmer, together with the right to cut timber from the lands described in the two contracts referred to, "the said timber to be cut as authorized by said two agreements and as permitted by that contract or agreement" entered into by him and Roots of date, December 24, 1902, and Palmer agreed to pay Morris \$1 per thousand as stumpage. Subsequently Palmer sold one-half interest in his business and the contracts in question to Linton, who agreed in writing to assume one-half of the contract existing between Palmer and Morris, and thereafter Linton and Palmer sold and transferred the mill property and contracts to the defendant, and it likewise stipulated and agreed in writing to assume and

carry out such contracts. It thus appears that, at the time defendant acquired its rights to the timber in controversy, it was not only advised of the contract between Morris and Palmer, modifying the previous contracts, but expressly agreed to comply therewith, and it must therefore necessarily have known the terms thereof. It is one of muniment to its title, and its rights are to be determined thereby.

DECREE AFFIRMED.

Decided 10 March, 1906.

ON MOTION FOR REHEARING.

94 Pac. 182.

MR. CHIEF JUSTICE BEAN delivered the opinion.

11. It is insisted that Morris is a necessary and proper party to this suit. But he is in no way interested in the subject-matter of the litigation, nor are any of his rights involved. His connection with the matter is only because appellant's interest in the contracts in controversy were secured through him, and its rights are to be determined by the original contracts as modified by himself and Roots. Such modified contracts are the muniments of appellant's title, and Morris is no more a necessary party to the litigation than a grantor in one of the deeds in the chain of plaintiff's title would be in an action to recover real property.

12. It is also contended that plaintiff ought not to be permitted to maintain this suit, because in March, 1905, he commenced an action at law against the defendant for a violation of the terms of one or both of the contracts in question, and in April of the same year brought a suit in equity to reform one of them, and that such litigation was pending and undetermined at the time this suit was commenced; but it arose out of matters occurring prior to the cause of suit set out in the present complaint, and has no connection therewith, other than it may have arisen out of the same contract. It is perhaps true that a plaintiff cannot proceed at the same time in equity and at law upon the same claim or demand, and that, when he

comes into a court of equity, he is bound to put under its control all his legal rights relating to the whole subject-matter of the litigation: *Eastman v. Amoskeag Mfg. Co.* 47 N. H. 71; *Prothero v. Phelps*, 7 DeGex M. & G. *722. This suit is founded on matters arising subsequent to July 1, 1905.

Other questions are discussed in the petition, but they are substantially covered by the opinion heretofore filed. The record shows, we think, that defendant has taken all the timber from section 31 to which it is entitled, except the saw timber from the strip 11 rods wide, and, as the court below decided, it is entitled to take, at any time during the life of the contract, all the timber 12 inches and upwards in diameter from section 6, whether suitable for manufacturing into lumber or not. The modification of the contracts by Morris and Roots, to the effect that the latter should have the right to cut and remove all timber under 12 inches in diameter, was manifestly intended to restrict, rather than to enlarge, the rights of the vendee under such contracts, and cannot by any fair construction be held to entitle Morris or his assignee to any saw timber from section 31.

Petition denied.

AFFIRMED: REHEARING DENIED.

Argued 6 March, decided 16 April; rehearing granted and reargued 8 August, decided 22 October, 1907.

DAVIDSON v. RICHARDSON.

89 Pac. 742,* 91 Pac. 1080.

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—JUDGMENTS—DOWER.

1. A statute enlarging the dower estate is void as to pre-existing debts as withdrawing part of the judgment debtor's property from lien and sale, thus impairing the obligation of a contract.

JUDGMENT—ENTRY NUNC PRO TUNC—RETROSPECTIVE EFFECT.

2. Where, at the time confession of judgment was executed and entered by the clerk, no judgment was entered thereon, but it was entered on the judgment docket and execution was issued and sale had, and afterwards judgment was entered *nunc pro tunc* as of the date of the confession of judgment, the

*NOTE.—The opinion upon rehearing being complete in itself, the original opinion is not published.

—REPORTER.

entry was retrospective, and had the same force as if made at the time when judgment was rendered, except as to third persons having intervening rights.

SAME—EFFECT ON INTERVENING RIGHTS—INCHOATE DOWER RIGHT.

8. Although a *nunc pro tunc* entry of a judgment does not operate to create a lien from a date earlier than its actual entry to affect intervening rights of third persons, the possessor of an inchoate right of dower in land of the judgment debtor at the time judgment was rendered, who has not changed her condition upon faith in the record, has no such interest as entitles her to protection.

From Polk: WILLIAM GALLOWAY, Judge.

Statement by MR. JUSTICE EAKIN.

This is a suit for the assignment of dower. Decree for plaintiff, and defendant appeals. W. M. Davidson, plaintiff's husband, in his lifetime was the owner in fee of the donation land claim of Carter T. Davidson and wife, containing 320 acres. On November 9, 1892, defendant, A. J. Richardson, loaned \$3,550 to W. M. Davidson, who in consideration thereof agreed to give a judgment lien on said premises less 46½ acres theretofore sold, and for that purpose and on the same day duly executed and delivered to the clerk of Polk County, his confession of judgment in the circuit court for that county, without action. Said confession of judgment was duly entered by the clerk in the journal and in the judgment docket of said court, but he failed to enter the formal judgment on said confession, and thereafter, on December 5, 1898, on the application of defendant, such judgment was entered *nunc pro tunc*. Prior to the entry of said judgment, viz., July 10, 1897, execution was issued on said confession of judgment and the judgment docket entry, which execution was duly levied on said land, and sale thereof duly made thereon to defendant on August 14, 1897. Thereafter and on December 28, 1899, a sheriff's deed was made thereon to defendant. W. M. Davidson died July 26, 1904. His wife brings this suit for the assignment of dower in said lands under the law in force at the time of the death of her husband, viz., for one-half thereof. Defendant concedes that she is entitled to dower therein, but only to the extent of one-third thereof, according to the law in force at the time of the docketing of said confession of judgment. The statutory provision for dower at that time was Section 2954 of Hill's Code:

"The widow of every deceased person shall be entitled to dower, or the use, during her natural life, of one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof."

This law was amended in 1893 by changing the words "one-third part" to read "one-half part": B. & C. Comp. § 5515.

For appellant there was a brief and an oral argument by *Mr. William M. Kaiser*.

For respondent there was a brief and an oral argument by *Mr. James K. Weatherford*.

MODIFIED.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. In the original opinion we rested the case exclusively upon the fact that the legislature has control over the liens of judgments, and that, in this case, the effect of the enlargement of the dower estate was only a withdrawal of property from the lien of the judgment to the extent of the increase of the dower estate. It is insisted, however, that the effect of the amended statute increasing the dower estate, is to deprive the defendant of his remedy by execution by withdrawing a portion of the debtor's property from liability, and that this impairs the obligation of his contract; and we must concede that this is the effect of the amendment.

The case of *Watson v. New York Cent. R. Co.* 47 N. Y. 157, cited in the opinion, holds that the lien is subject to the control of the legislature, but it was further suggested that, though the legislature could authorize the appropriation of the land for public use free from the lien, yet the compensation paid therefor was still subject to execution; that is, the legislature did not put the debtor's property beyond the reach of his creditor. The right to the lien relates to the remedy, but the right of the creditors of a debtor to avail themselves of his property at all events for the satisfaction of his debts, is not a question of remedy, but of right. The case of *McCormick v. Alexander*, 2 Ohio, 65, quoted in the opinion, and cases cited thereunder,

only hold that the lien is subject to the control of the legislature, but do not go to the extent of holding that the debtor's property may be exempted from existing debts. *Edwards v. Kearzey*, 96 U. S. 595 (24 L. Ed. 793), relates to the creation of a homestead exemption, which withdrew the property not only from the lien of judgments, but also from liability to execution, and there it is held to impair the obligation of the contract. This is also the effect of *Gunn v. Barry*, 15 Wall. (U. S.) 610, 622 (21 L. Ed. 212). The facts in the case of *Patton v. Asheville*, 109 N. C. 685 (14 S. E. 92), are parallel with those before us, so far as it affects this question, and it was held that the act of the legislature enlarging the dower estate impaired the obligation of the contract. In that case there was no lien in favor of the creditor, but under the law at that time, the property of a debtor was subject to the payment of his debts, and the statute enlarging the dower, having the effect to withdraw a portion of the debtor's property from levy and sale, was void as to such debts contracted prior to the statute, and we conclude, without reference to the power of the legislature to modify or abolish the lien of a judgment, if the property of the debtor, or a material portion thereof, is withdrawn from the reach of pre-existing creditors, it thereby impairs the obligation of such contracts. That was the effect of the enlargement of the dower estate before us, and such statute cannot affect defendant's judgment; and the decision of this court heretofore rendered in this case as to the effect of this statute must be set aside.

2. It appears, however, that when the confession of judgment by Wm. M. Davidson on November 9, 1892, was executed and entered by the clerk, no judgment was entered thereon, but it was entered upon the judgment docket upon that date, and on July 7, 1897, execution was issued thereon and sale of the lands in question was had thereunder on August 14, 1897. Afterwards, on December 5, 1898, by order of the said court, such judgment was entered *nunc pro tunc*, as of November 9, 1892, and plaintiff insists that such entry of judgment is not

retrospective as against plaintiff's interests, and that she is entitled to dower under the statute of 1893. The office of a *nunc pro tunc* entry is to record some act of the court done at a former term which was not then carried into the record; and such entry is retrospective and has the same force and effect as if entered at the time when rendered, except as to third parties having intervening rights: *Cleveland Leader Print. Co. v. Green*, 52 Ohio St. 487 (40 N. E. 201: 49 Am. St. Rep. 725); *McNamara v. N. Y., L. E. & W. R. Co.* 56 N. J. Law, 56 (28 Atl. 313); *Ferrell v. Hales*, 119 N. C. 199 (25 S. T. 821). It was held in *Doughty v. Meek*, 105 Iowa, 16 (74 N. W. 744: 67 Am. St. Rep. 282), that such entry validates all prior proceedings, including the issuing of execution: *Los Angeles Bank v. Raynor*, 61 Cal. 145; *Emrich v. Gilbert Mfg. Co.* 138 Ala. 316 (35 South. 322); *Lowenstein v. Caruth*, 59 Ark. 588 (28 S. W. 421). Although such entry validates the execution issued therein, it could not operate to create a lien from a date earlier than its actual entry to affect intervening rights of third parties: *McNamara v. N. Y., L. E. & W. R. Co.* 56 N. J. Law, 56 (28 Atl. 313). As between Richardson and Davidson, the *nunc pro tunc* entry is retrospective, and has the same force and effect as if entered at the time the judgment was rendered (Freeman, Judgments (3 ed.), § 67), and, unless they have rights intervening prior to the date of such entry, its effect cannot be questioned by third parties.

3. Plaintiff's interest in the land on December 5, 1898, the date of the entry of the judgment, was not such as to make her an intervening party within the meaning of the law. Her inchoate right of dower was increased by the legislative act, but she did not act upon conditions then existing, nor did she pay value or otherwise change her condition upon faith in the record, but was only a possible beneficiary under the statute. We understand that, to be protected from the effect of the *nunc pro tunc* entry, plaintiff must have been in the position of a *bona fide* purchaser for value: Freeman, Judgments (3 ed.),

§§ 66, 67; *Leonard v. Broughton*, 120 Ind. 536 (22 N. E. 731: 16 Am. St. Rep. 347, 355). In this case it is held:

"It appears, from the fact averred, that the judgments in favor of the appellants were rendered upon pre-existing obligations. Their rights were fixed prior to the rendition of the judgments, and it does not appear that they were misled, or that they parted with anything of value, or acquired any rights during the interval which elapsed between the date the judgment should have been properly entered and the making of the *nunc pro tunc* entry, except that they acquired a judgment lien; and the rule is that the general lien of a judgment creditor upon lands of his debtor is subject to all equities existing against the lands of the judgment debtor in favor of third persons at the time of the recovery of the judgment."

However independent of the effect of the entry of the judgment, the contract between Richardson and Davidson is the thing protected by the constitution, and the act increasing the dower is void as to such contract without reference to the entry of judgment or the creation of a lien, and therefore it is immaterial whether plaintiff's inchoate rights under the dower act can be affected by a *nunc pro tunc* entry or not. Defendant's right antedates the judgment and is such that the legislature cannot impair it, and plaintiff cannot complain of the *nunc pro tunc* entry, as the dower statute is without effect as to defendant's contract, regardless of the judgment: *Patton v. Asheville*, 109 N. C. 685 (14 S. E. 92); *Edwards v. Kearzey*, 96 U. S. 595 (24 L. Ed. 793); *Bronson v. Kinzie*, 42 How. (U. S.), 311 (11 L. Ed. 143); *Gunn v. Barry*, 15 Wall. U. S.), 610 (21 L. Ed. 212).

Therefore, the decision of this court heretofore rendered must be set aside, and the decree of the lower court is hereby modified as follows: That the plaintiff is entitled to dower in the lands described in the complaint to the extent of one-third part thereof, and the cause will be remanded to the lower court, with directions to proceed with the assignment of such dower in manner provided by law.

MODIFIED AND REMANDED.

Argued 16 October, decided 17 December, 1907.

STATE v. BLODGETT.

92 Pac. 830.

CRIMINAL LAW—CONFESSIONS—ADMISSIBILITY—DETERMINATION OF COURT.

1. On the offer of a confession of accused, the court must determine whether it was made under the influence of hope or fear. This inquiry is preliminary to the admission of the evidence, and is addressed entirely to the judge.

REVIEW.

2. The determination of the court that a confession of accused was obtained without the influence of hope or fear will not be disturbed on review, unless there is clear and manifest error.

TRIAL—RULINGS ON EVIDENCE—STRIKING OUT.

3. The rule that the court should refuse to strike out irrelevant and immaterial evidence, admitted without objection, does not apply where a question does not call for improper evidence, but the answer contains evidence which is objectionable, and where it is not responsive or is too much in detail or proves to be hearsay, in which case the proper practice is too move to strike it out and to have the jury directed not to consider it.

CONFESSIONS—ADMISSIBILITY.

4. A confession made to a public officer in answer to questions assuming accused's guilt, and while accused was imprisoned, is admissible, if voluntarily made, and there must be some accompanying circumstances calculated to produce fear to exclude it on the ground that it was produced by fear.

SAME.

5. Accused, after being warned by the district attorney to the effect that whatever he said would be used against him, and that he need not make any statement unless he desired to, made a confession in answer to questions which assumed his guilt. Accused was in custody at the time. There was nothing to show accompanying circumstances calculated to produce fear. *Held*, that the confession was properly received in evidence.

TRIAL—IMPROPER ARGUMENT OF DISTRICT ATTORNEY.

6. Improper remarks of the district attorney in his argument to the jury in a criminal case, to which no objection was made at the time, will not be considered on appeal.

CONTROLLING ARGUMENT OF COUNSEL—OBLIGATION OF COURT.

7. The court in a criminal case must keep the attorneys for the State and accused within the bounds of legitimate argument and promptly check either when they exceed it, and, when improper argument is made, the court, on objection being made, must act and admonish the jury not to consider it.

OBJECTIONS—SUFFICIENCY—ACTION OF COURT.

8. The court, on objection by the counsel for accused to the argument of the district attorney, stated that when accused's counsel came to address the jury he might challenge the correctness of the statements of the district attorney. The counsel subsequently objected to other remarks of the district attorney, and the court merely stated that the latter must confine his argument to the evidence. *Held*, that the action of the court was tantamount to overruling the objections to the argument, and, where accused's exceptions were included in the bill of exceptions, the matter was reviewable on appeal.

IMPROPER ARGUMENT—GROUND FOR REVERSAL.

9. The rule that it is error sufficient to reverse a conviction for the court to suffer counsel, against objection, to state facts not in evidence or to comment

on facts calculated to prejudice the jury, rests on the facts of each particular case as to what matters adverted to but not in evidence are pertinent to the issues, or what immaterial matters referred to may produce injury to the substantial rights of accused.

SAME.

10. It is improper for the district attorney in his argument to the jury in a homicide case to refer to another criminal, who had killed his wife, his mother-in-law, and father-in-law in the county where accused was being tried, or to what other criminals may have done, and how they accomplished their crimes and the defense they made.

SAME.

11. The refusal of the court to interfere, on objections being made to the improper argument of the district attorney in his argument to the jury in a homicide case, cannot be justified by the fact that accused's counsel had an opportunity to address the jury in reply, and might then refute the assertions of the district attorney.

PREJUDICIAL ERROR.

12. A criminal case should not be reversed because of improper argument of counsel, unless it appears that injury to the rights of accused resulted, which question will be determined by the issue involved and the state of the evidence.

CONFESSION—CONCLUSIVENESS.

13. A confession offered in evidence is not conclusive on accused, but he may disprove any statements therein, and the jury may give such weight to a confession as they deem proper on considering the circumstances connected therewith.

DRUNKENNESS—EXCUSE FOR CRIME.

14. Drunkenness does not excuse accused for a criminal case, but it may be considered by the jury in determining the purpose, motive, or intent with which he committed the crime, to fix the degree of guilt.

IMPROPER ARGUMENT OF COUNSEL.

15. Where, in a homicide case, there was evidence tending to show that accused, in consequence of drunkenness, was insane and deprived of the capacity for deliberation and premeditation essential to constitute murder in the first degree, the argument of the district attorney, in which he ridiculed the plea of insanity by stating the circumstances of other crimes committed in the same locality, for which the perpetrators suffered the extreme penalty of the law, was reversible error, where the court, notwithstanding the objections of accused, merely stated in its charge that the jury should disregard all matters that occurred during the trial that were not admitted in evidence.

SAME.

16. It was improper for the district attorney in a homicide case to discuss the general character of accused and comment on his failure to call witnesses from another State to sustain good character, where accused had not testified in his own behalf, nor offered witnesses to show good character.

From Multnomah: M. C. GEORGE, Judge.

The defendant, George L. Blodgett, was charged with the crime of murder in the first degree, tried and convicted; from the judgment entered thereon, he appeals.

REVERSED AND NEW TRIAL ORDERED.

For appellant there was a brief and an oral argument by *Mr. John A. Jeffrey*.

For respondent there was a brief and oral argument by *Mr. Gus C. Moser*, Deputy District Attorney.

MR. COMMISSIONER SLATER delivered the opinion.

1. The defendant by information of the district attorney was charged with the crime of murder in the first degree, alleged to have been committed in the City of Portland, March 23, 1906, by killing one Alice Minthorn, commonly known as Alice Gordon. He was subsequently tried and convicted on the charge, and from the judgment entered thereon he has appealed.

The first error assigned by defendant for a reversal of the judgment is the denial by the lower court of his motion to strike out the testimony of Julia Maxwell, who gave the details of a confession made by defendant wherein he admitted that he committed the act, and gave the surrounding circumstances of the commission of the offense. The grounds of the motion were that the purported confession was not voluntary, but was made under circumstances implying coercion. Preliminary to the introduction of the confession, the witness testified that she was present at the police station or city jail in Portland, on March 24, 1906, at about 11 o'clock in the forenoon, in the presence of Mr. Manning, district attorney, Detectives Vaughn and Hellyer, F. L. Perkins, a news reporter, and defendant, for the purpose of taking the statement of the defendant in shorthand, which she did; that, before the statement was made, Mr. Manning asked defendant if he was willing to make a voluntary statement, and he replied that he was; that Manning then told him if he did it would be used against him in the trial of the case, and that he need not do so unless he wanted to. Then, in response to questions propounded to him by the district attorney, defendant made the statement, which was taken in shorthand by the witness, read by her to the jury, and received in evidence. No objection to the admis-

sion of the confession was made prior to its being read to the jury by the witness from her notes, but upon the conclusion of the reading, defendant's counsel moved that all of the confession be stricken out for the reason that it was not voluntarily made. It is now contended on the part of the State that, the testimony having been received without objection, the motion to strike out comes too late.

2. On the offer of a confession, the court is to determine whether or not it was made under the influence of hope or fear. This inquiry is preliminary to the admission of the evidence, and is addressed entirely to the judge: *State v. Moran*, 15 Or. 265 (14 Pac. 419). And the determination of the court on a criminal trial that a confession was obtained from him without the influence of hope or fear exercised by a third person will not be disturbed on review, unless there is clear and manifest error: *State v. Rogoway*, 45 Or. 601 (78 Pac. 987, 81 Pac. 234).

3. It would seem, therefore, that if defendant should have any reason to claim that the alleged confession was involuntary, he should present his objection when the offer is made, and, before the conclusion of the preliminary hearing, offer such testimony, if he have any, to support his objection and to rebut that offered by the State, or, upon his failure to do so, be precluded from thereafter objecting. "A majority of the authorities hold that it is the duty of the court to refuse to strike out evidence, although irrelevant and immaterial, which has been admitted without objection at the time it was offered": 12 Cyc. 565. But there are manifest exceptions to this rule, as where a question does not apparently call for improper evidence, but the answer contains evidence which is inadmissible or objectionable; and where it is not responsive or is too much in detail, or proves to be hearsay, the proper practice is to move to strike it out and to have the jury directed not to consider it: 12 Cyc. 565.

4. The involuntary character of the confession here offered is said to arise not from some independent or disconnected act

of the district attorney or of the officers in charge of the prisoner, by which fear in the latter may have been induced, which acts may have been shown by preliminary proof, but from the substance and form of the confession itself, and hence could not be shown or passed upon by the court in advance of the statement of the confession. Assuming, but not deciding, that this case comes within the exception, and that the motion to strike out was available to the defendant notwithstanding the absence of any previous objection, the confession was clearly voluntary, and therefore admissible.

The basis of the objection is that the confession was made in response to peremptory and accusatory questions addressed to defendant by the district attorney, which destroyed its voluntary character. The most prominent and striking questions, and the replies, were in part as follows:

"Q. I want to know the true name of this girl you killed.

A. Her name is Alice—Alice Shoenberg, or such a name.

Q. How old a man are you?

A. Forty-two years old, 26th of last September.

Q. How old was this woman you killed?

A. She claimed to be 32 years old.

Q. Was she ever married, that you know of?

A. She married a man by the name of George Minthorn. * *

Q. How long did you know this girl you killed?

A. I met this girl a year ago last October, 1905, in Helmsville, Mont.

Q. What was she doing when you met her?

A. She was performing and singing on the stage.

Q. What were you doing at that time?

A. I was running a saloon at Columbia Falls Cut-Off."

Following these questions, and in response to the question, "How did you happen to meet her?" defendant, without any apparent restraint, gives a free and frank statement not only of how he happened to meet the deceased, but also a history of their meretricious and unlawful cohabitation from that time, interspersed with their quarrels and encounters, to the time of the tragedy, which occurred in an upstairs room of a hotel in

Portland where deceased had been staying. At this point in the story he is asked by the district attorney, "How did you come to quarrel with her this last time?" in response to which he gives a minute circumstantial statement of what transpired between them during three or four days immediately preceding the killing, as well as of his drinking and visiting saloons that morning in company with a friend, Malloy. He concludes this recital by saying:

"Finally I says to him, 'I will be back in about 15 minutes. I am going up to the room, and I will be back.' I said, 'I am going to ask Alice to have a drink, and if she refuses I am going to kill her.' I went up, and I guess you know what happened.

Q. Now, what did happen?

A. They say I killed her, and I guess I did."

Then by a series of questions all the details of the killing were brought out. The foregoing will give a fair idea of how the confession was obtained and its form.

5. A confession is admissible when voluntarily made to a public officer, even though the prisoner be in custody of such officer, unless the confession be in some sense elicited by threats or promises (*State v. McDaniel*, 39 Or. 161: 65 Pac. 520); and a prisoner's confession will not be rejected as evidence, merely because it was made in answer to a question which assumed his guilt: Wharton, Crim. Ev. (9 ed.), §§ 662, 663; 12 Cyc. 468. Confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession if it appears to have been voluntary and was not obtained by putting the prisoner in fear, or by promises: *Sparf v. United States*, 156 U. S. 51 (15 Sup. Ct. 273: 39 L. Ed. 343); *Wilson v. United States*, 162 U. S. 613 (16 Sup. Ct. 895: 40 L. Ed. 1090). So, then, there must be some accompanying circumstances calculated to produce fear, other than the mere fact that it was made in a prison where the prisoner was in legal custody, or that it was made to a public officer, or that it was made in answer to questions that assumed his guilt. There is no evidence of any such other circumstances here. The warning

given by the district attorney to the prisoner before he addressed any questions to him, to the effect that whatever he said would be used against him and that he need not make any statements unless he desired to, overthrows any possible inference of duress that might otherwise be drawn from the form and the manner of the questions afterwards put to the prisoner. And this fact distinguishes this case from such cases as *Bram v. United States*, 168 U. S. 532 (18 Sup. Ct. 183: 42 L. Ed. 568), where the court were divided upon the admissibility of the confession, and the cases of *State v. Auguste*, 50 La. Ann. 488 (23 South. 612), and *Parker v. State*, 46 Tex. Cr. R. 461 (80 S. W. 1008: 108 Am. St. Rep. 1021), cited by counsel for defendant in support of his contention. In the last case mentioned there was not only an absence of warning, but the defendant was apparently tricked into making inculpatory admissions by artfully propounded questions in the form of a cross-examination. No error was committed by overruling defendant's motion.

6. It is next insisted that the district attorney, when addressing the jury in the first argument, on behalf of the State, upon the merits of the case, abused the right of argument by adverting to matters not in evidence, and not proper to be considered, by reflecting and commenting upon defendant's general character, when the same was not in issue, by insinuating that defendant is guilty of other crimes, and by expressing his personal opinion that defendant's witnesses had committed perjury, all to the injury of his substantial rights and over his objections.

7. No attempt was made in this court to maintain the propriety of the objectionable remarks, but, on the contrary, it was contended that the alleged error was not properly before this court for consideration, and it was also expressly admitted by counsel for the State that, if it were here, there was perhaps sufficient in the record to justify a reversal. In the course of the opening argument to the jury for the State by the district attorney, there were frequent interruptions and objections made

by defendant's attorney to statements made by the former as not supported by the evidence, and as a consequence there was much wrangling between counsel which the court did little to suppress. A part only of the language objected to will be noticed. The district attorney, referring to defendant and deceased, said:

"Why, he knew her for years in Montana. He slept with her when he had a legitimate wife. He knew she cohabited with other men, and he knew he kept her in a house of prostitution because it could not be anything more than a house of prostitution; he kept her in a dance hall; he made her wear short skirts; and he made her sell drinks in those short skirts."

On objection being made by counsel for defendant that there was no evidence to support the last statement, the court ruled:

"In a case where the attorney is misstating the evidence, as you claim, and you have the right to follow him, there is no need of any exception."

The court further said:

"You may claim his statements are incorrect, and then the jury will be instructed in all these cases."

Whereupon counsel for defendant saved an exception to the refusal of the court to instruct the district attorney, to which the court said:

"The court will not undertake to settle what is in evidence; that is for the jury."

8. At another time in his argument, the district attorney made the statement: "Gentlemen of the jury, this man Malloy lied when he went on the stand, and you know it, and so do I." But no objection was made thereto at the time by defendant's attorney. Later on, the district attorney said:

"But this man who seeks every advantage, even beyond the law, every advantage imaginable that a defendant could reasonably expect under and by virtue of the law, he has; even then he asks you to go beyond the law; he asks you to go beyond the law in this: He asks you to not say by your verdict that he is guilty of murder in the first degree. Why? Because he wants to live on. That man wants to live on. I ask you, gen-

lemen, if he is of that character of individual manhood that ought to be permitted to live on? I ask you if the mere fact of taking a human life by the hands of a mere animal like that in a community civilized as we are, if he is a man—I repeat it again—who ought to live on? No; far from it. Gentlemen of the jury, we have in the penitentiary plenty of men of his ilk to make stoves for us. But the gallows wants him, and I demand at your hands that justice, full and fair, shall be meted out to this man as he deserves, owing to the crime he has committed and the charge which he is now facing. Why, gentlemen of the jury, if you say by your verdict this man should not be hung, why should I stand here before you and ask at your hands that this man suffer the penalty of death upon the gallows? I ask why? Simply because it is the duty imposed upon me by virtue of my office, and I am doing it honestly, just as I expect you, gentlemen of the jury, to do it, and it is there upon the statute books, and until it is obliterated from the statute books it is incumbent upon you, gentlemen of the jury, and when a man comes before you twelve men who are sitting here to try this case fairly and impartially, and tells you he did it, then, in the name of God, what should he expect? He tells you he committed this murder, tells you he shot this woman four times and kills her, and the police officers tell you he is the coolest man they had ever seen in all their career with criminals, and yet the nerve of this great big man of Montana to ask and to expect twelve citizens of Oregon to save his neck under such circumstances. Why, how absurd it is, gentlemen of the jury. We would not save the neck of a citizen whom we all knew under such circumstances, who resided here with us for years and years, let alone a man who comes into a strange State and seeks to do his crime in another State, where he figures he does not leave as much disgrace upon the people he leaves behind him, as he would if he committed it at his home, in his own state. Why, what a farce this justice of ours would be in the State of Oregon, and what a shame and disgrace it would bring upon our State, if we were to allow this man the privilege of a penitentiary sentence. Why, think of this man that went down here and killed his wife, his mother-in-law, and his father-in-law—

Mr. Lord: If your honor pleases, I object.

Mr. Manning: Gentlemen of the jury, just think of—

Mr. Lord: I object to that.

Mr. Manning: Think of that. He was tried by me and before his honor—

Mr. Lord: I except to the remark, if your honor please.

Mr. Manning: I ask you, gentlemen of the jury, to think of all these atrocious crimes—

Mr. Lord: I object. One moment, Mr. Manning.

The Court: One moment.

Mr. Manning: If this man don't permit me to address the jury, I won't get through today.

The Court: References to other cases not in evidence when objected to, are not permissible.

Mr. Manning: I understand.

Mr. Lord: He has no right to comment upon other crimes. to try to inflame the minds of the jurors that way, and I except to it, and desire your honor to instruct the jury to disregard it.

Mr. Manning: I will comment upon it in a way..

Mr. Lord: And I note an exception.

The Court: Counsel, of course, should confine himself to inferences from the testimony.

Mr. Manning: That would be applicable in commenting on this case; yes, sir. I want you to just go with me a minute, if you please, back to the time when Wade and Dalton came to the State of Oregon, gentlemen of the jury—go with me right over there across the Willamette River to the home of the—

Mr. Lord: If your honor pleases, I object to that.

Mr. Manning: —of the family that lost their son at the hands of Wade and Dalton.

Mr. Lord: I object to the comparison by the district attorney in this case, and desire an exception.

Mr. Manning: Yes. Well, did you ever try a lawsuit before?

Mr. Lord: I would not think that you had from the way you are performing. If your honor pleases, I object to the remarks made by the district attorney in comparing this defendant with other defendants in cases which are within the minds and memories of the jury. Judge McBride has made a ruling upon that point, and I think your honor has, and I know that several other judges have. It is improper, it is unjust to the defendant, making an odious comparison which he has no right to make.

Mr. Manning: Yes.

The Court: Well, the argument of counsel should be confined to the evidence.

Mr. Manning: I am going to make this comparison.

Mr. Lord: Well, then, I except to the statement; I object to it—

Mr. Manning: You can except to it all you want to.

Mr. Lord: And your honor will allow an exception?

The Court: Note an exception, Mr. Reporter.

Mr. Manning: I told you a minute ago, I called your attention particularly to Wade and Dalton; I am going to do it again.

Mr. Lord: And I except, your honor.

Mr. Manning: They came over on the east side of the river and undertook to hold up one of the nicest young men we had in this town, and they shot him purely accidentally. I tried the case against them; they shot him purely accidentally. But supposing, gentlemen of the jury, they had said they were both intoxicated that night, that 'we were intoxicated and we didn't know what we were doing; we killed this man, but killed him under a different statute than this man killed this woman under'; they killed him under that statute where, if you commit murder in an attempt to commit arson or robbery, then the crime should be murder in the first degree. But suppose that they had come into court and undertook to justify by saying they were drunk, and found twelve citizens of Multnomah County that would have said, 'Those are two nice, decent-looking young fellows,' and they say they were—Wade wasn't twenty-one years old until the day after he was hung—they were nice-appearing boys.' They walked right into this courtroom, gentlemen of the jury, and they said, 'We did it, and we had no right to do it,' and I admired them, and if it had not been for George Chamberlain—Governor Chamberlain—I would have saved one of them. Gentlemen of the jury, they had the manhood and the nerve; but this contemptible, cowardly man from Montana, he had the nerve, the awful nerve, the gigantic power to walk up those stairs to where a defenseless prostitute was, who was no better than himself, and kill her. Why? Because she refused to live with him. Gentlemen of the jury, I would rather acquit a man who went out here on the public highway and held you up at the point of a revolver and took your property from you than I would to say that under any circumstances imaginable—draw on your imagination as best you can—that a case of this kind would be justifiable because of liquor or insanity. Where is this insanity dodge? Gentlemen of the jury, it is always to be found in a coward. And more especially is he a coward when he says

the woman did it. The woman did it? Adam? You remember this Adam—I will call him Adam from Montana—Adam pointed his finger, and he says, ‘Eve did it’; ‘the woman broke up my home, gentlemen of the jury; she made a tramp and a bum of me; she forced me to go up into that room and kill her.’ Why, gentlemen of the jury, what must this man, Mr. Lord, think you twelve men are? What must he think you twelve men are, and what must this coward think you twelve men would be if you were to save his neck?”

And again, at a later period of his address, he proceeded to state to the jury:

“Gentlemen of the jury, I don’t want to say anything derogatory to the character of his former wife. Far from it. I don’t want to say that she ought not to be here. Perhaps she feels it in her heart that she should be here; perhaps she feels it her duty to be here; but, gentlemen of the jury, I want you to eliminate the former Mrs. Blodgett from your minds absolutely and forever; because she only shows that weakness which you find in many, many good women. I would venture the assertion, gentlemen of the jury, if she would only unfold a tale of her life while she lived with Blodgett, there would not be many among you that would hesitate in finding a verdict against this man of murder in the first degree. Gentlemen of the jury, there never has been a single thing in that man’s life,—I know it for this reason, if that man had a character of any kind imaginable, there would have been men here from Montana to say it was good. That is the first defense that a murderer always puts up—good character. Where is this man’s character? You have it. You have it, gentlemen of the jury. You know what it is; that is, so far as this case you are trying is concerned.

Mr. Lord: Wait a minute. I object to that, and I take an exception to the district attorney’s remarks.

Mr. Manning: You know this man is a murderer.

Mr. Lord: One moment.

The Court: One moment; one moment.

Mr. Manning: Oh, my!

Mr. Lord: Well, if you knew a little more and talked a little less you would say less ‘Oh, mys’!

Mr. Manning: Well, go ahead.

Mr. Lord: If your honor pleases, counsel knows—I know he does—that he has no right to comment upon the character of the defendant. The character is not in issue.

Mr. Manning: Character is always in issue, if you want to put it in issue.

Mr. Lord: I except to the remarks of the district attorney.

Mr. Manning: So I say, gentlemen of the jury, that you have his character. Now, I ask you, is it good or bad? That is all I want you to say. Is it good or bad? Is the man who never did anything but run a dance hall and engage prostitutes, is that kind of a man, gentlemen of the jury, to be excused from a crime of this character? No."

The language first excepted to will not be considered at length, as the substance thereof is fairly to be inferred from the evidence, but it is there stated for the purpose of noting the attitude of the court towards defendant's objections and its reasons therefor, which becomes material in the discussion of the case to follow. The language to which the second objection is now made cannot be considered, because no objection was made at the time, and hence there was no judicial error on the part of the lower court in that regard: *Watson v. Southern Oregon Co.* 39 Or. 481 (65 Pac. 985). The third portion of the district attorney's argument above set forth is stated at considerable length to show what was the real issue discussed, and the application made by the district attorney of the language to which specific objection was made, viz., "Why, think of this man that went down here and killed his wife, his mother-in-law, and his father-in-law," and the subsequent references made by him to the Wade and Dalton case.

9. But first it is argued by the State that no ruling was made by the court on defendant's objections, and no exception was taken or allowed to a ruling of the court, and therefore, the question sought to be raised is not before this court. As to the court not having ruled upon the objections, it is apparent from what occurred and was said by the court upon defendant's first interruption that the question was considered by the court as having been once passed upon, and a ruling made to the effect and purport that counsel, when he comes to address the jury, might challenge the correctness of the statements of the district attorney as to what was or was not in evidence,

and that it was for the jury to decide. This, taken in connection with the subsequent demeanor of the court, was tantamount to overruling defendant's objections and equivalent to permission to the district attorney to continue in his line of argument notwithstanding defendant's objections, which he did without restraint. It was the duty of defendant's counsel to present his objection to the court at the time, and press it to a decision and save his exceptions. This he did, and that is all the law requires of him, and when his exceptions are included in the bill of exceptions signed by the court it is an allowance thereof.

But the court seems to have misconceived its duty, which was to keep the attorneys, both for the State and defendant, within the bounds of legitimate argument, and to promptly check either when they exceeded it: *People v. Lange*, 90 Mich. 454 (51 N. W. 534). The judge does not sit upon the bench as a silent and passive spectator of what is going on, but sits to administer the law and guide the proceedings before him: *State v. Robertson*, 86 N. C. 628.

When the party who is injured by the wrong calls for the intervention of the court by an objection, it will not do for the court to remain silent, leaving the matter of misconduct with the offending party and the jury. The court is bound to interpose when so called upon, and, if an improper and injurious statement has been made without excuse, the effect of it should be erased from the minds of the jury, then and there, by an emphatic and explicit admonition from the court: *Nelson v. Welch*, 115 Ind. 270 (16 N. E. 634, 17 N. E. 569). It may be said with equal propriety that the district attorney, although charged with the duty of prosecuting the defendant, has an equal responsibility with the court in seeing that the defendant has a fair and impartial trial. The evidence offered should be legal and pertinent, fairly and impartially stated to the jury, and the deductions and arguments therefrom legitimate and candid. If in the prosecution it should happen, by inadvertent or hasty expression or otherwise, that improper and

injurious statements are made to the jury, it is the duty of the offending party to make it appear by the record that nothing reasonably proper to be done was omitted in order to rectify the wrong and restore to the trial the fairness of which he presumably divested it: *Nelson v. Welch*, 115 Ind. 270 (16 N. E. 634, 17 N. E. 569). The taking of an exception by defendant and its incorporation into the bill of exceptions preserved his rights, and the matter is properly before the court for our consideration. "It is a well-established rule that it is error sufficient to reverse a judgment for the court to suffer counsel, against objection, to state facts pertinent to the issue and not in evidence, or to comment upon facts calculated to prejudice, which have no bearing whatever upon the issues, and evidence of which would have been ruled out, or to assume *arguendo* such facts to be in the case when they are not": 2 Enc. Pl. & Pr. 729. While this states the general rule, yet it must finally rest upon the facts of each particular case as to what matters adverted to but not in evidence are pertinent to the issues, or what immaterial matters referred to may produce injury to the substantial rights of the defendant.

10. It needs no extended consideration or citation of authority to establish that the references made in this case by the district attorney to some other criminal who, it was said, had killed his wife, his mother-in-law and his father-in-law in the county where defendant was being tried, or to what Wade and Dalton, other criminals, may have done, and how they accomplished their nefarious crime, and what manner of defense they made to the charge of murder, could have no legitimate bearing on the guilt or innocence or the degree of guilt of this defendant. It is manifestly obvious that reference to such matters was highly improper. Mr. Justice HEAD, in *Dollar v. State*, 99 Ala. 236 (13 South. 575), says:

"But there should be a limit placed upon this license. * * We do not mean to say that the solicitor may not comment upon the evils generally of the crime which the law he is seeking to enforce intends to prevent, but he goes beyond this when

he gratuitously states to the jury, as a fact, the existence of particular evils in the locality of the defendant's offense, and to which that offense is supposed by him to be related."

11. Nor is the refusal of the court to interfere justified by the fact that the defendant, who is objecting, has an opportunity to address the jury in reply, and may then refute the assertions of the State's attorney. Questions of this kind generally arise out of the closing arguments, but the rule is the same at whatever stage of the case the improper language is used: 2 Enc. Pl. & Pr. 730. If it was proper to present these things to and comment on them before the jury, it was proper for the jury to consider them in making up their verdict, and, if it was proper for them to be considered by the jury, they would be and should have been admitted in evidence, but no one, we apprehend, will contend for a moment that such matters are admissible.

12. But a case should not be reversed where improper references have been made by counsel in their argument to immaterial and irrelevant matters, unless it further appears that injury to the rights of defendant resulted, and that will be determined by the issue involved and the state of the evidence.

13. Although the confession of defendant, which was properly received in evidence, admitted not only the fact of the killing, but also facts tending to show that the act was committed by him with such deliberation and premeditation as to constitute murder in the first degree, yet that is not conclusive upon defendant. "The accused is not estopped to deny and disprove the statements in his confession. He may show that when he confessed he was intoxicated, and may disprove by independent evidence of any sort any incriminating fact confessed by him. The rule that a confession is to be considered in its entirety does not compel the jury to give the same belief to every part of it. The jury may attach such credit to any part of it as they deem it worthy of, and may reject any portion of it which they do not believe. All of it must be carefully weighed by the jury, and upon all the circumstances sur-

rounding the case they must determine how much of it they will receive and how much of it they will reject": 12 Cyc. 484. The competency of the evidence is, however, for the court, while the weight and credibility of a confession as evidence are to be determined by the jury upon the same principles that they determine the weight and credibility of any evidence; that is, upon the consideration of all the circumstances connected therewith: 12 Cyc. 485. The defense attempted to be made was insanity, claimed to have been produced by excessive and prolonged drinking of intoxicants, which deprived the defendant of the capacity of deliberation and premeditation, necessary to constitute murder in the first degree, and reduced the crime at least to murder in the second degree, and from which intoxication or the effects thereof, it was claimed, at the time of making the confession, he had not fully recovered. From the tenor of that portion of the district attorney's argument found in the record, that seems to have been the main issue.

14. Drunkenness does not excuse the defendant in a criminal action, but may be considered by the jury in determining the purpose, motive or intent with which he committed the crime, in order to fix the degree of his guilt: *State v. Zorn*, 22 Or. 600 (30 Pac. 317); B. & C. Comp. § 1393. There was evidence tending to support this defense, and also that he did not, in fact, make to his friend Malloy the statement contained in his confession to the effect that he was going up to the deceased's room with an intent to kill her. So, instead of finding defendant guilty of murder in the first degree, as they did, the jury may have found him guilty in some lesser degree, according to the importance and degree of credibility they attached to the confession and to the testimony of different witnesses. Therefore, when the district attorney sought by argument and ridicule to show to the jury the absurdity of a plea of insanity in this case, by resorting to the facts and circumstances of other crimes committed in the same locality for which the perpetrators suffered the extreme penalty of the law,

all of which he stated to the jury, their minds must have been influenced against the defendant.

15. It is claimed by the State, however, that the possibility of prejudice in the minds of the jury, from the admitted improper and objectionable language, was counteracted and prevented, by the court instructing the jury as follows:

"In this case you will disregard all matters that occur during the trial that are not strictly admitted in evidence under the instructions of the order of the court, and the comments of counsel for the State wherein they may be based upon matters not in evidence, unless they do it by way of argument or inference, such as is natural to follow or adopt in your experience as the sole and exclusive judges of fact from matters of great public notoriety."

Very many abuses in argument may be sufficiently counteracted by the instructions of the court to the jury, and a large discretion as to the refusing of new trials because of such violations of propriety is accorded to the trial courts. The appellate court will frequently condemn the language or conduct of counsel, and at the same time affirm a judgment denying a new trial, on the ground that under all the circumstances the rights of the defeated party were not materially prejudiced, or that action of the trial court in the premises was effectual to restore to the proceedings the fairness of which they had been divested: 2 Enc. Pl. & Pr. 752. And this court in the case of *State v. Anderson*, 10 Or. 448, declined to reverse the case when the district attorney, while addressing the jury, commented upon the defendant's failure to take the witness stand in his own behalf, which this court says was certainly not proper. The defendant objected at the time and saved an exception. The trial court did not, at the time, rule on the right of the district attorney to make the remarks, but in the final charge to the jury instructed them that "no inference or assumption could be drawn by the jury from the omission of the defendant to testify."

That instruction was specific and directed to the correction of a possible injury, but the instruction in the present case is

general, and leaves it still to the jury to say whether reference has been made by counsel for the State to matters not in evidence, or whether counsel's argument is a natural or proper inference to be drawn from matters of assumed great public notoriety. The jury should be made to understand that in making the statement counsel violated the propriety of his position, and that if they did not wholly disregard it they would violate their duty as jurors: *Nelson v. Welch*, 115 Ind. 270 (16 N. E. 634). Moreover, in *State v. Anderson*, 10 Or. 448, the court say that: "The objectionable comments seem to have escaped the assistant district attorney in the heat of the argument, and not to have been repeated after the interposition of the appellant's objection; and the court was careful to charge the jury against any impression such comments might have left upon their minds." But they also say: "If a course of remarks of this kind had been persisted in on the part of the prosecution, under the permission of the court, and against the objections of the appellant, and exceptions properly taken, there is no doubt but the judgment must have been reversed." Now that is just what occurred in the present case. The defendant, notwithstanding the strenuous effort of his counsel in his behalf, during the progress of the trial, was at the mercy of the inactivity of the court, combined with the persistence of counsel for the State in rehearsing to the jury immaterial and prejudicial matters not in evidence, and to comment thereon and to draw inferences therefrom to defendant's evident disadvantage.

16. Equally unfortunate and improper was the discussion by the district attorney of the general character of the defendant, and his comment upon defendant's failure to call witnesses from Montana to sustain a good character. He had not testified in his own behalf or offered other witness to show a good character for himself. The prosecution cannot impeach the defendant's character unless he puts it in issue: Wharton, Crim. Ev. § 64. And in a criminal case, comments on the defendant's failure to adduce evidence of his good character, when the

latter has not been put in issue, has been held to be error not cured by subsequent instruction to the jury to disregard the comments. "The court should not have permitted such an argument," says Mr. Justice LONG, in *People v. Evans*, 72 Mich. 367 (40 N. W. 473); and for other authorities see footnote, 2 Enc. Pl. & Pr. 739.

Enough has been said to show the reason and necessity for a reversal of the judgment and the ordering of a new trial.

REVERSED.

Argued 16 October, decided 17 December, 1907.

KNAPP v. WALLACE.

92 Pac. 1054.

CORPORATIONS—FOREIGN CORPORATIONS—ACTIONS—JURISDICTION.

1. Before service of process on the president of a foreign corporation will confer jurisdiction, it must be made to appear that the corporation is doing business in the State, or is otherwise within its jurisdiction; but if the company is doing business in the State, or has an office therein in connection with its business, then the presence of an officer in connection therewith is the presence of the corporation.

SAME—SERVICE ON FOREIGN CORPORATIONS—PRESUMPTIONS.

2. So long as a corporation confines its operations to the State within which it was created, and it has no office or transacts no business in this State, no presumption can arise that service on the president of the corporation within this State is service on the corporation.

JUDGMENT—COLLATERAL ATTACK—JURISDICTION—PRESUMPTION.

3. Jurisdiction of the person of a defendant is presumed in support of a judgment only when he is within the territorial limits of the court, and, if he is not within such limits, the records must show service on him; hence, where a return, indorsed on the summons of a foreign corporation, does not show that such corporation is doing business in the State or has an office therein, it is insufficient to show service on the corporation, and, unless aided by recitals in the decree, the defect will render the decree void as against the corporation.

SAME.

4. Generally, if the record of a judgment is silent as to service, or, if in the absence of a return, there is a recital of due service in the judgment, then upon collateral attack jurisdiction will be conclusively presumed; but where the record contains the return of service, the recital must be considered as referring to such return.

CORPORATIONS—FOREIGN CORPORATIONS—SERVICE ON FOREIGN CORPORATIONS—VALIDITY OF SERVICE—STATUTORY PROVISIONS—JURISDICTION.

5. Section 55, B. & O. Comp., provides that in an action against a private corporation, summons shall be served by delivering a copy thereof, etc., to the president, etc., or in case none of the officers named shall reside or have an office in the county where the cause of action arose, then to any clerk, etc., who may reside or be found in the county, and if no such officer be found, then by leaving a copy at the residence, etc., of such clerk or agent. A complaint

showed that defendant was a foreign corporation owning property in Josephine County in this State, and the return of service merely showed personal service on the president of the corporation in Multnomah County, without showing that it was made in the county where defendant corporation had its principal office or place of business, or that it was doing business in the State; and those facts did not appear in the record, though the decree recited an examination of the return made in the case, "wherefore, it is thereby and otherwise made to appear to the satisfaction of the court that the defendant corporation has been duly served with summons within the State." *Held*, that the record disclosed that there was no service on the corporation, and that the court acquired no jurisdiction over it; the decree in such a case will be held void on a collateral attack.

PROCESS—SERVICE—AMENDMENT BY EX-SHERIFF OF SERVICE BY DEPUTY.

6. An ex-sheriff cannot amend a return of a service made by his deputy during his term of office.

SAME—SUBSTITUTED SERVICE—TIME OF MAILING.

7. An affidavit for an order of service by publication stated defendant's postoffice address. The order required mailing accordingly. The summons required defendant to appear and answer "on or before the last day of the time prescribed in the order for the publication." The order for publication was dated May 16, 1904. The first publication was June 25, 1904, and the last August 6, 1904. The affidavit of mailing was made on January 4, and filed January 9, 1906, and stated that the copies of summons and complaint were mailed August 6, 1904. *Held*, that the mailing was not a compliance with the order of the court or the statute, and was insufficient to give the court jurisdiction.

SAME—AMENDMENT OF RETURN AFTER DECREE—LEAVE OF COURT.

8. Where plaintiff, four months after the entry of the decree, filed, as an amended return, an affidavit of the person making the original affidavit to the effect that the mailing was done on June 25, 1904, but it did not appear that leave of court was obtained to amend the return, nor that there was any showing made by affidavit on which to base the order, the amendment is ineffectual to aid the jurisdiction of the court.

CORPORATIONS—ACTIONS AGAINST FOREIGN CORPORATIONS—JURISDICTION—SUFFICIENCY OF AFFIDAVIT FOR PUBLICATION.

9. Where an affidavit for publication shows that defendant, a foreign corporation, with its principal office and place of business in California, had theretofore been engaged in mining in Josephine County, but had ceased operations there, and had no officer or agent therein on whom service could be made, but that its officers reside and are in California, it is sufficient to show that service could not be made in this State, in view of Section 56, B. & O. Comp., providing that in actions against a private corporation summons shall be served by delivering a copy to the president or other head of the corporation, etc., or managing auditor, or in case none of the officers of the corporation above named shall reside or have an office in the county where the cause of action arose, then to any clerk, etc., who may reside or be found in the county, or, if no such officer be found, by leaving a copy, etc.

APPEAL—DISPOSITION OF CAUSE—REMANDING.

10. On appeal, in a foreclosure case, where it appeared from the record that defendant had a prior mortgage, but plaintiff, admitting the mortgage, claims it has been paid, but there is no proof of payment, and the trial court held a foreclosure by defendant valid, which on appeal is declared void, there is an issue undisposed of, and, where defendant's answer is in such a condition that the Supreme Court cannot give him the relief to which he is entitled, a final decree will not be rendered, but the case will be remanded with leave to defendant to amend his answer.

From Josephine: HIERO K. HANNA, Judge.

Statement by MR. JUSTICE EAKIN.

The complaint in this case sets out a cause of suit for foreclosure of a mortgage, bearing date of February 7, 1900, executed by Edgar T. Wallace, in favor of Mrs. O. Julien, upon mining lands in Josephine County, Oregon, as security for the payment of a promissory note for \$1,445, with interest thereon at the rate of 10 per cent per annum; that thereafter on March 7, 1901, said Wallace conveyed said lands to the defendant, the Althouse Mining Co., a corporation, and on October 13, 1904, said Mrs. Julien duly assigned said note and mortgage to plaintiff, who is now the owner and holder thereof; that the defendant, the Althouse Mining Co., is a foreign corporation organized under the laws of the State of Maine; that its principal office and place of business is in Yreka, California; that defendant, James Camp, claims some interest under a prior mortgage, but that the same has been paid. The defendant, Camp, answers the complaint, alleging that he is the owner of a note and mortgage executed by defendant, Wallace, September 26, 1899, upon the same property in favor of Minnie P. Shotwell, in the sum of \$4,256, with interest thereon at the rate of 10 per cent per annum, and that on May 14, 1904, he commenced a suit in the Circuit Court of the State of Oregon for Josephine County, to foreclose said mortgage, in which he made said Wallace and Mrs. Julien and the Althouse Mining Co., defendants; and on January 9, 1905, decree was rendered thereon in favor of this defendant, Camp, foreclosing his said mortgage and the rights of Mrs. Julien under the mortgage at that time owned by her, which is the one sought to be foreclosed by plaintiff, Knapp, in this suit, and pleads that decree as a bar to this suit. Plaintiff replied to the new matter of the answer, in which he questions the jurisdiction of the court to render the decree by reason of alleged defects in proof of service of the summons.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. William C. Hale*.

For respondent there was a brief and an oral argument by *Mr. H. D. Norton*.

Opinion by MR. JUSTICE EAKIN.

1. At the trial, the judgment roll in the suit of *Camp v. Althouse Mining Co.* was offered in evidence by the plaintiff, to show want of jurisdiction of the court, and by the defendant to show jurisdiction. The proof of service of the summons upon the defendant, the Althouse Mining Co., appears by the return of the sheriff of Multnomah County, W. A. Story, by H. L. Moreland, his deputy, made on the 18th day of May, 1904, by personal service in Multnomah County on B. F. Walker, president of the said Althouse Mining Co.; but it does not show that such service was made in the county where defendant corporation had its principal office or place of business, or that it was doing business within the State of Oregon, nor does either of those facts appear anywhere in the record. Section 55, B. & C. Comp., provides that a corporation may be served by delivering a copy of the summons and certified copy of the complaint

“* * to the president or other head of the corporation, secretary, cashier, or managing agent, or in case none of the officers of the corporation above named shall reside or have an office in the county where the cause of action arose, then to any clerk or agent of such corporation who may reside or be found in the county, or if no such officer be found, then by leaving a copy thereof at the residence or usual place of abode of such clerk or agent.”

2. Plaintiff insists that the record discloses want of jurisdiction, in that the sheriff's return shows service upon Walker, as president of the defendant corporation, in Multnomah County, without any showing that the company is doing business within the State or has an office therein, or that such officer was within the State upon business of the corporation. Whether this could be collaterally attacked upon the recital of this return, in case defendant were a domestic corporation, is not necessary for a decision here. But the defendant is a for-

eign corporation, and, before service in Oregon upon its president will confer jurisdiction, it must be made to appear that the corporation is doing business in Oregon, or otherwise within its jurisdiction. If the company is doing business in Oregon, or has an office therein, in connection with its business, then the presence of an officer in connection therewith is the presence of the corporation.

As said in *Farrell v. Oregon Gold Co.* 31 Or. 463, 467 (49 Pac. 876, 877):

"So long as the corporation confines its operations to the state within which it was created, it cannot be subjected to the jurisdiction of a court of another state, where it has no office or transacts no business, by the service of process on some officer or agent while temporarily present in the latter state, because he cannot take the corporation with him beyond the jurisdiction of the state of its creation."

In such a case no presumption can arise that service on Walker, as president, within the State, is service upon the corporation. As said in 17 Am. & Eng. Enc. Law (2 Ed.), 1078: "Jurisdiction of the person of a defendant is presumed, in support of the judgment, only when he is within the territorial limits of the court, and, if he is not within such limits, the record must show service on him": *Galpin v. Page*, 85 U. S. (18 Wall.) 350 (21 L. Ed. 959). Therefore the return indorsed upon the summons is insufficient to show service upon the corporation.

3. Unless it is aided by the recitals in the decree, such defect renders the decree void as to defendant corporation, but the decree recites: "And now having fully examined the return made in the cause, wherefore it is thereby and otherwise made to appear to the satisfaction of the court that the defendant, Althouse Mining Co., has been duly served with summons within the State of Oregon," default is entered. The authorities are not in harmony as to when such a recital is conclusive upon a collateral attack, some holding that it is conclusive unless it is positively contradicted by the record; others holding that, if the record discloses the return upon which the recital

Based, and such return does not support the recital, it will not aid the return: See 1 Black, Judgments, §§ 273, 275. Mr. Justice FIELD, in *Galpin v. Page*, 85 U. S. (18 Wall.) 350, 365 (21 L. Ed. 959), in discussing presumptions in favor of the judgment of a court of general jurisdiction, says:

"It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. * * The latter (of the parties) should regularly appear, by evidence, in the record of service of process upon the defendant or his appearance in the action. * * But the presumptions, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts, concerning which the record is silent. * * When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer, or the proof of service contained in the record, that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appear in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were it so, it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face. The answer to the attack would always be that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed."

1 Black, Judgments, § 273, says:

"But, while it is inadmissible to contradict the record by extrinsic evidence, it is always open to the party to show that one part of the record contradicts another part. Thus the recital of service in a judgment may be contradicted by producing the original summons and return. But the contradiction must be explicit and irreconcilable."

In *Settlemier v. Sullivan*, 97 U. S. 444, 448 (24 L. Ed. 1110), where a judgment rendered in Oregon is collaterally attacked, it is said:

"Here it is contended that the recital in the entry of the default of the defendant in the case of the State court, 'that, although duly served with process, he did not come, but made default,' is evidence that due service on him was made, notwithstanding the return of the sheriff, and supplies its omission. But the answer is that the recital must be read in connection with that part of the record which gives the official evidence prescribed by statute. This evidence must prevail over the recital, as the latter, in the absence of an averment to the contrary, the record being complete, can only be considered as referring to the former."

4. This corporation is a nonresident, and when a judgment against a defendant, not within the territorial limits of the State, "is produced in evidence, the authority for its rendition must appear upon the face of its record. * * The presumptions of jurisdiction which exist in favor of the judgments of a court of general jurisdiction, when proceeding according to the course of the common law, ceases when the authority to render the judgment is made to depend upon a prescribed mode, according to special statutory provisions. * * (In the latter case) no presumption will be indulged to sustain the judgment": Mr. Chief Justice LORD, in *Odell v. Campbell*, 9 Or. 298, 300. See, also, *Willamette Real Estate Co. v. Hendrix*, 28 Or. 485 (42 Pac. 514: 52 Am. St. Rep. 800). In *Northcut v. Lemery*, 8 Or. 316, 322, it is said:

"But where a decree contains a recital that due service was made, and the return of the sheriff purports to set out the mode of service, and the mode set out is insufficient, the recital will not aid the return."

To the same effect in *Heatherly v. Hadley*, 4 Or. 1; *Tustin v. Gaunt*, 4 Or. 305. So, also, it is held in *St. Clair v. Cox*, 106 U. S. 350, 359 (1 Sup. Ct. 354, 362: 27 L. Ed. 222), upon collateral attack of the judgment, that when "service is made, within the State, upon an agent of a foreign corporation, it is

essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record, either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court, that the corporation was engaged in business in the State." *Harris v. Sargeant*, 37 Or. 41 (60 Pac. 608), is to the same effect, although in that case the recital of the decree expressly refers to the return.

5. Neither the return nor the record, in this case, shows that the company was doing business within the State, nor that it had an office or place of business within the State. On the contrary, the complaint only shows that the corporation is a foreign corporation, and that it owns the property in question situated in Josephine County. Generally, if the record is silent as to service, or, in the absence of a return, there is a recital of due service, then, upon a collateral attack, jurisdiction will be conclusively presumed. But where the record contained the return of service, then the recital must be considered as referring to such return; and in this case the record discloses that there was no service upon the Althouse Mining Co., and the court acquired no jurisdiction over it.

6. Defendant, however, attempted to remedy this defect by an amended return of the sheriff, in which W. A. Story, who was sheriff at the date of the attempted service, May 18, 1904, makes affidavit to a return in which he states that H. L. Moreland, his deputy, served the Althouse Mining Co. by delivering the copies of summons and complaint "to B. F. Walker, at the principal and only known place of business of the Althouse Mining Co., aforesaid, within the State of Oregon," he being president, etc. This does not even bring the return within the rule laid down in *St. Clair v. Cox*, 106 U. S. 350 (1 Sup. Ct. 354; 27 L. Ed. 222). Further, this amended return was executed December 8, 1904, and on motion of plaintiff on the 9th day of January, 1905, the court granted leave to file said amended return. Here the return of the sheriff of a service made by a deputy is sought to be amended by the then sheriff.

now out of office; not as to matters of form, but by adding facts relating to such service. This we think is not competent. "The amendment can only be properly made by the officer who served the process or in accordance with memoranda made by him, which state the facts that were omitted or incorrectly set forth in the return: *Murfree, Sheriffs*, § 876. See, also, *O'Conner v. Wilson*, 57 Ill. 226; *County of La Salle v. Milligan*, 143 Ill. 321 (32 N. E. 196). The ex-sheriff, W. A. Story, cannot be presumed to know what was done by his deputy in making a service; and, if the facts in such a case may be established from memoranda of the deputy, it must be upon proof to the court: *Murfree, Sheriffs*, § 875a (page 440u); *In re Bayley*, 132 Mass. 457; *Smith v. Martin*, 20 Kan. 572; *White v. Ladd*, 34 Or. 422 (56 Pac. 515); *Fisk v. Hunt*, 33 Or. 424 (54 Pac. 660). Therefore, the jurisdiction in *Camp v. Althouse Mining Co.* is not aided by the amended return.

7. The service of the summons in the suit of *Camp v. Althouse Mining Co.* upon Mrs. O. Julien, the plaintiff's assignor, which is by publication, is questioned as to the proof of mailing. The affidavit for an order of service by publication states her postoffice address, and the order of the court requires the mailing accordingly. The summons requires the defendant to appear and answer "on or before the last day of the time prescribed in the order for the publication." The order for publication is dated May 16, 1904. The first publication was June 25, 1904, and the last August 6th. The affidavit of mailing was made by Ernest Lister on the 4th day of January, and filed on January 9, 1905, and states that the copies of summons and complaint were mailed August 6, 1904, so that the mailing was not a compliance with the order of the court or the statute, and was not actually made until the last day of the time limited in the summons for her appearance, and is insufficient to give the court jurisdiction: *Bank of Colfax v. Richardson*, 34 Or. 518 (54 Pac. 359; 75 Am. St. Rep. 664).

9. Then, four months after the entry of the decree, *i. e.*, May 3, 1905, plaintiff files an amended return of mailing, *viz.*, an

affidavit of Lister that the mailing was done on June 25, 1904. It does not appear that leave of the court was obtained to amend such return, nor is there any showing made by affidavit as to facts upon which to base the order for leave to amend it so, and such amendment is ineffectual to aid the jurisdiction of the court. Therefore the decree in *Camp v. Althouse Mining Co.* was ineffectual to foreclose the Camp mortgage, and does not bar plaintiff in this suit from foreclosing his mortgage.

9. In the suit before us, default was rendered against the Althouse Mining Co., and is not questioned in the record, but defendant, in his brief urges that plaintiff is not entitled to a decree, for the reason that the affidavit for publication does not sufficiently show that the Althouse Mining Co. had no clerk in the county, or that such clerk had no residence there. It does show that defendant was a foreign corporation with its principal office and place of business in Yreka, California; had theretofore been engaged in mining in Josephine County, but had ceased such operations therein, and has no officer or agent therein upon whom service of the summons can be made, but that its officers reside, and now are, at Yreka, California. We think this is sufficient to show that service could not be made in Oregon under Section 55, B. & C. Comp.

10. These views result in a reversal of the decree of the lower court; but we believe that a final decree should not be entered here which would defeat defendant's rights under his mortgage. The record discloses that defendant has a prior mortgage upon the same property in the sum of \$4,256; and this is admitted by plaintiff in his complaint, but he claims it has been paid. Yet the only contest in the case was whether the decree of foreclosure of said mortgage is valid as against the Althouse Mining Co., and no proof being offered by plaintiff to show payment, hence an issue is left undisposed of. The lower court held this decree of foreclosure to be valid, and, this court now holding such decree void, defendant is still entitled to have his mortgage foreclosed; but in the present condition

of his answer this court cannot give him the relief to which he is equitably entitled.

Therefore, on the authority of *Smith v. Wilkins*, 31 Or. 421 (51 Pac. 438), and *Robson v. Hamilton*, 41 Or. 239 (69 Pac. 651), the cause will be remanded to the lower court with leave to amend his answer, and such other proceedings as may be proper, not inconsistent with this opinion. REVERSED.

Argued 16 October, decided 17 December, 1907.

BROWN v. LEWIS.

92 Pac. 1058.

JUDGMENT—COLLATERAL ATTACK—JURISDICTION—FOREIGN CORPORATIONS—SERVICE OF PROCESS—SUFFICIENCY.

1. Where the complaint, in a transitory action against a foreign corporation, alleged a cause of action for personal service rendered by plaintiff to defendant between June 23, 1903, and May 15, 1904, as manager and superintendent of its mines in Josephine County, at an agreed salary, and that the action was begun May 18, 1903, in Josephine County, it is a sufficient showing, as against a collateral attack, that the defendant was doing business in the State when the action was commenced.

VENUE—TRANSITORY ACTIONS—NONRESIDENT DEFENDANT.

2. Under Section 44, B. & C. Comp., providing that except in certain cases an action shall be commenced and tried in the county where defendants, or either of them, reside or may be found at the commencement of the action, or, if none of the parties reside in the State, it may be tried in any county which plaintiff may designate; transitory actions not within the exception may be commenced against a nonresident in any county plaintiff may select, and personal service anywhere within the State will give the court jurisdiction.

JUDGMENT—COLLATERAL ATTACK—SERVICE OF SUMMONS.

3. Under section 55, B. & C. Comp., providing that in an action against a private corporation, summons shall be served by delivering a copy, etc., to the president or other head of the corporation, etc., or, in case none of the officers named shall reside or have an office in the county where the cause of action arose, then to any clerk who may reside or be found in the county; where a complaint shows that the corporation is doing business in the State, and that the action is upon a contract for service within the State, relating to that business, service of summons made upon its president in another county than where the action is pending is *prima facie* evidence that he represented the defendant company in the State, and the notice is sufficient *prima facie* to give the court jurisdiction, and, if the service is defective, it must be attacked in that proceeding and cannot be questioned collaterally.

APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

4. In replevin against a sheriff to recover property claimed under an execution sale on a judgment against a certain company, which property was held by defendant under a writ issued in a case by K. against the company, admission of evidence that K. had indemnified defendant against any loss by

reason of the action, and that defendant was acting as sheriff when he took the property and held it as such, and that plaintiff's attorney in the first action was his agent in the purchase and possession of the property, was not reversible error where the verdict included no damages.

REPLEVIN—WRONGFUL TAKING—NECESSITY FOR DEMAND.

5. In replevin, demand is unnecessary where the taking is wrongful.

PLEADING—COMPLAINT—DEFECTS—AIDED BY VERDICT.

6. Though an allegation in a complaint for replevin that defendant wrongfully took the property is defective in not disclosing that it was taken from plaintiff, where the proof discloses that it was wrongfully taken from plaintiff's possession, the defective allegation is aided by verdict so as to support a judgment for plaintiff, and defendant is not entitled to a direction of a verdict.

TRIAL—DEMURRER TO EVIDENCE BEFORE DEFENDANT RESTS.

7. A defendant cannot demur to plaintiff's testimony, unless he also rests his case, and a motion for nonsuit is the only proceeding for insufficiency of evidence open to defendant at the close of plaintiff's case.

From Josephine: **HIERO K. HANNA**, Judge.

Statement by **MR. JUSTICE EAKIN**.

This is an action of replevin against the defendant, as sheriff, to recover attached personal property held by him upon a writ issued in the case of *Knapp v. Wallace*, 50 Or. 348 (92 Pac. 1054). Plaintiff claims title to the property through a sale thereof upon execution issued upon the judgment in the case of *Brown v. Althouse Mining Co.*, rendered in the Circuit Court of the State of Oregon for Josephine County. Upon the trial, plaintiff offered in evidence the judgment entry in that case, which was admitted, and afterwards the defendant offered in evidence the summons in that action and the sheriff's return of service thereon for the purpose of impeaching the said judgment; the return reciting service upon the defendant company by delivering a copy of the summons and complaint to B. F. Walker, president of the company, in Multnomah County, Oregon. At the close of the trial, defendant asked the court to instruct the jury to find for the defendant, for the reason that the judgment, through which the plaintiff claims title, is void for want of jurisdiction in the court to render it. The principal question in the case is whether, by this service of summons in *Brown v. Althouse Mining Co.*, the court obtained jurisdiction of defendant company.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. William C. Hale*.

For respondent there was a brief and an oral argument by *Mr. H. D. Norton*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. As to the collateral impeachment of judgments rendered by domestic courts of general jurisdiction, personal service upon a foreign corporation, and the amendment of the sheriff's return, reference is made to the opinion in *Knapp v. Wallace*, 50 Or. 348 (92 Pac. 1054), decided at this term upon a similar service of summons. The case of *Brown v. Althouse Mining Co.* was a transitory action against a foreign corporation. The complaint alleges a cause of action for personal service rendered by the plaintiff to the defendant between June 23, 1903, and May 15, 1904, as manager and superintendent of the operation of its mines in Josephine County, Oregon, under an employment by it at an agreed salary. That action was begun May 13, 1904, in Josephine County. As against a collateral attack, this is a sufficient showing that the defendant, the Althouse Mining Co., was doing business in Oregon when the action was commenced, which will give the courts of this State jurisdiction of the defendant company if served in manner provided by law; and in transitory actions against a nonresident the action may be commenced in any county plaintiff may select, and personal service anywhere within the State will give the court jurisdiction: Section 44, B. & C. Comp.; *Fratt v. Wilson*, 30 Or. 542 (47 Pac. 706, 48 Pac. 356). Section 55, B. & C. Comp., provides that service upon a private corporation shall be made upon it by delivering the summons and complaint to the president or other head of the corporation, secretary, etc.

2. The following facts are before us: A private corporation doing business within the State; an action upon a contract for service within the State relating to that business; service of summons made upon its president in another county than the

one where the action is pending, and judgment rendered thereon. This is notice that reaches defendant corporation and is sufficient to give the court jurisdiction as against a collateral attack. In *St. Clair v. Cox*, 106 U. S. 350, 359 (1 Sup. Ct. 354, 362 : 27 L. Ed. 222), it is said: "When service is made within the state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court, to render a personal judgment that it should appear somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court—that the corporation was engaged in business in the state. The transaction of business by the corporation in the state, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company." When such service is obtained, it is sufficient to give notice to the defendant, and, if it is defective, he must attack it in that proceeding, and it cannot be questioned collaterally. 1 Black. Judgments, § 224, states:

"Although the service of process in an action may have been characterized by some defect or irregularity, it does not necessarily follow that the ensuing judgment will be void, for, if the party would take advantage of such a matter, he must do so in the action itself by some proper motion or proceeding. It is only when the attempted service is so irregular as to amount to no service at all that there can be said to be a want of jurisdiction."

And 1 Black, Judgments, § 263, states:

"It follows that the judgment of a court of general jurisdiction cannot be attacked collaterally when there has been some service of notice, although such service of notice may be materially defective. The rule as stated by the court in Nebraska is that, where there is an attempt at service reaching the defendant, a defect in the manner of the service or form of the return is a mere irregularity, and is not ground for collateral

attack on the judgment": *Campbell Ptg. Press & Mfg. Co. v. Marder*, 50 Neb. 283 (69 N. W. 774; 61 Am. St. Rep. 573); *Griffin v. McGavin*, 117 Mich. 372 (75 N. W. 1061; 72 Am. St. Rep. 564).

3. The situation here is identical with the case of *Farrell v. Oregon Gold Co.* 31 Or. 463 (49 Pac. 876), except that here the service on the president is not made in the county where the defendant company was doing business. In that case it is held that it is not necessary that the return show that he was the agent of defendant to represent it in this State, but that such a service is *prima facie* sufficient to give the court jurisdiction. In that case the question arose upon a direct attack. In the case under consideration the attack is collateral, and the action, being transitory, may be brought in any county, and the service upon the president within the State, when the corporation is doing business therein, is sufficient *prima facie* to give the court jurisdiction under B. & C. Comp. § 44, and *Fratt v. Wilson*, 30 Or. 542 (47 Pac. 706, 48 Pac. 356), and is *prima facie* evidence that the president represented the defendant company here. Therefore we hold that the defendant cannot question the sufficiency of the service of the summons in this proceeding.

4. At the trial exception was taken by defendant to the ruling of the court in permitting plaintiff to prove that Knapp had indemnified him against any loss by reason of this action, and to prove that defendant was acting as sheriff when he took the property and held it as such; also, testimony that Norton was Brown's attorney in the first action, and his agent in the purchase and possession of the property. We think that the admission of such testimony was not reversible error. It was competent for plaintiff to prove that defendant was acting in his official capacity as sheriff in taking the property. If he took it wrongfully, he is personally liable, and the facts may be shown. The verdict included no damages; therefore defendant was not prejudiced by evidence upon that question.

5. It is claimed by defendant that there is no allegation or

proof of a demand for the return of the property; but a demand is unnecessary where the taking is wrongful, and the allegation of the complaint is that the defendant wrongfully took the property. This is very defectively alleged in not disclosing that it was so taken from the plaintiff.

6. But this defective allegation is aided by the verdict, and the proof discloses that it was taken from the plaintiff's possession; the defendant testifying that at the time he attached the property he knew that he had previously sold it to plaintiff, and that it was in his possession. Therefore the defendant was not entitled to an instruction directing a verdict in his favor.

7. At the close of plaintiff's testimony, defendant asked the court to instruct the jury to return a verdict for defendant. but no such proceeding is allowable under our statute unless defendant also rested his case. A motion for nonsuit is the only proceeding open to defendant at the close of plaintiff's case for insufficiency of the evidence.

We find no error in the proceeding of the lower court, and therefore the judgment is affirmed.

AFFIRMED.

Argued 24 October, decided 17 December, 1907.

FISHBURN v. LONDERSHAUSEN.

92 Pac. 1060, 14 L. R. A. (N. S.) 1234.

ATTACHMENT—PROPERTY SUBJECT—BILLS AND NOTES.

1. Sections 299-302, B. & C. Comp., provide in effect that all property not exempt from execution shall be subject to attachment, and that personal property capable of manual delivery, and not in possession of a third person, shall be attached by the sheriff taking it into his possession, and garnishment proceedings are provided to reach personal property not capable of manual delivery and in possession of a third person. Section 4586 defines a negotiable promissory note as an unconditional promise in writing engaging to pay on demand, or at a fixed or determinable time, a certain sum in money. *Heltl*, that a negotiable promissory note belonging to defendant, in his possession, and bearing no indorsements, was subject to attachment and sale under execution.

WORDS AND PHRASES—"PROPERTY."

2. "Property" means everything of exchangeable value, and includes money, chattels, things in action, and evidence of debt. This also is recognized as including things which may be sold and that may be assessed for taxation.

BILLS AND NOTES—ACTION BY HOLDER.

3. Under Section 4483, B. & C. Comp., authorizing the holder of a negotiable instrument to sue thereon in his own name, where a note belonging to defendant was attached and sold under execution, the purchaser might sue thereon in his own name, irrespective of whether the indorsement by the sheriff to him was regular or irregular.

JUDGMENT—PRESUMPTION IN FAVOR OF.

4. Every presumption will be given to proceedings in a court of general jurisdiction necessary to support the validity of its judgments and decrees, when the court is proceeding according to the common law.

PLEADING—DEMURRER—CONSTRUCTION OF PLEADING.

5. A complaint, when tested by a demurrer, must be construed most strongly against plaintiff.

JUDGMENT—PLEADING JUDGMENT—SERVICE BY PUBLICATION.

6. Section 56, B. & C. Comp., provides that, in case of service of process by publication, a copy of the summons shall be deposited in the postoffice, directed to the defendant at his last known postoffice address. *Held*, that where, in an action on a note purchased by plaintiff at a sale under execution, based on a judgment in an attachment suit against the owner of the note, the complaint alleged service by publication in the action against the owner of the note and his default, but failed to show that a copy of the summons was deposited in the postoffice directed to defendant at his last known postoffice address, and no reason was given for failure to meet such requirement, and it did not appear that due diligence had been used to ascertain defendant's whereabouts, the complaint was insufficient to show jurisdiction.

APPEAL—DISPOSITION OF CAUSE—PROCEEDINGS IN TRIAL COURT.

7. Where on appeal it was found that the trial court acted properly in sustaining a demurrer to the complaint, the cause would be remanded for further proceedings, within the discretion of the trial court.

From Yamhill: **GEORGE H. BURNETT**, Judge.

A demurrer to the complaint having been sustained, judgment was rendered in favor of defendant, from which plaintiff appeals.

AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.

For appellant there was a brief over the names of *Roswell L. Conner* and *S. H. Gruber*, with an oral argument by *Mr. Conner*.

For respondent there was a brief over the names of *McCain & Vinton*, with an oral argument by *Mr. James McCain*.

Statement by **MR. COMMISSIONER KING**.

This is an action by *J. W. Fishburn*, as trustee, against *G. B. Londershausen* and *S. Londershausen* on a negotiable promissory note for \$200, with interest, executed to and made payable to the order of the State Savings Bank of Dayton, Oregon,

on February 17, 1904, due six months after date. The complaint was filed September 14, 1904, and, after setting out the note in full and alleging its execution, avers, in substance: That from February 9 to March 9, 1904, the State Savings Bank of Dayton, Oregon, was owned, managed and controlled by one Arthur C. Probert; that on March 9th of that year Probert absconded, leaving no person in charge of the bank, and left the said note, together with other property, locked up therein; that at the time of his disappearance he left many debts due to divers persons, including one J. G. Lewis, who had a claim against him for money deposited in his bank, for the recovery of which he brought an action against him in the circuit court for Yamhill County, and at the same time had a writ of attachment issued, in which the note here involved, with other property, was attached by the sheriff seizing and taking the same into his custody, which said officer thereafter, prior to its maturity, sold the same on execution to satisfy the judgment obtained therein, at which sale this plaintiff became the purchaser thereof. The complaint purports to give all the proceedings leading up to and including the service of summons, which was by publication, together with the entry of judgment, and sale of the attached note, as well as its delivery to plaintiff, among which appears the following allegation:

"That on the —— day of March, 1904, the said sheriff of Yamhill County, Oregon, returned said summons to the clerk of said circuit court of Yamhill County, Oregon, with his return indorsed thereon, duly certifying that he had made diligent search and inquiry for said defendant, Arthur C. Probert, and that said defendant, after due diligence, could not be found within the State of Oregon, and on the 30th day of March, 1904, it satisfactorily appearing to Hon. Geo. H. Burnett, judge of said Circuit Court of the State of Oregon for Yamhill County, by the affidavit of said J. G. Lewis, plaintiff in said action, that personal service of said summons could not be made upon said defendant, Arthur C. Probert, within the State of Oregon, and that a cause of action existed against said defendant and in favor of said plaintiff, that said defendant was not a resident of the State of Oregon, but then had property therein, which

had been duly attached in said action, and that said court had jurisdiction over such property and of the subject of said action; said Geo. H. Burnett, as such judge, and on said day, duly made and granted an order, in said action, that service on said summons be made upon said defendant, Arthur C. Probert, by publication thereof in the Yamhill County Reporter, a newspaper published weekly at McMinnville, Yamhill County, Oregon, and having a general circulation, by publishing same once a week for six consecutive weeks."

This is followed by averments showing a full compliance with the requirements of the order referred to in the foregoing paragraph, and, among other things, that at the time of the attachment and the taking of the note into custody by the sheriff, and sale thereof, it was the property of Arthur C. Probert, and in his bank, which bank he had apparently deserted; that plaintiff, J. W. Fishburn, as trustee, purchased the note at the execution sale resulting from the attachment proceedings, for a valuable consideration, and at the time of the filing of this action was the owner and holder thereof; that this note was free from any liens; and that the same was due and unpaid. A demurrer to the complaint was filed on the ground that it did not state sufficient facts to constitute a cause of action. The demurrer was sustained, and, plaintiff declining to further plead, judgment was accordingly entered dismissing the complaint and for costs and disbursements, from which this appeal is taken.

AFFIRMED AND REMANDED.

Opinion by MR. COMMISSIONER KING.

The points for determination are: (1) Is a negotiable promissory note, when found in the possession of its owner, and free from any liens, subject to attachment and sale under execution? (2) Does it appear from the complaint that, in the action between Lewis and Probert, there was sufficient compliance with the statutory requirements relative to service of summons to give the court jurisdiction to enter the judgment and order the sale of attached property?

1. In support of the first point, it is urged that the complaint is insufficient, in that it there appears that the note came

into plaintiff's possession through attachment proceedings and the execution sale based thereon; that no provision is made by the statute for the attachment of negotiable promissory notes, and proceedings had in reference thereto are therefore void. The statute bearing on the question provides, in effect, that all property in this state, not exempt from execution, shall be subject to attachment; that the writ of attachment shall be directed to the sheriff of the county in which the property of the defendant may be situated, requiring him to attach and safely keep any property of the defendant, not exempt from execution, sufficient to satisfy plaintiff's demands; and that personal property capable of manual delivery, and not in the possession of a third person, shall be attached by the sheriff taking it into his possession, from which time until the writ is executed the plaintiff, as against third persons, shall be deemed a purchaser in good faith: B. & C. Comp. §§ 299, 300, 301, 302. The complaint discloses that, at the time of the attachment, Arthur C. Probert was the sole owner and holder of the note involved, and that at the time of the levy it was not in the possession of any third person, but in the bank of which Probert was not only the sole owner, but the only one entitled to have charge thereof. The question as to the right to levy upon a negotiable promissory note and sell it under an execution issued for the sale of attached property has not heretofore been directly before this court; and all the authorities to which we have been referred, with but one exception, are from states where the codes in force at the time the decisions were rendered expressly included promissory notes with other kinds of property subject to levy and sale. That the right of attachment is not a common-law remedy, but must depend upon the statute of the state where invoked, is too well settled to admit of serious doubt, nor do we understand it to be questioned here; the contention by plaintiff being that the word "property," as used in our code, when indicating what may be levied upon, includes notes, while defendants insist that notes are neither expressly nor impliedly made the subject of attachment or sale. The effect, therefore, to be given

to the provisions of the statute upon the subject, depends upon the construction to be placed upon the word "property"; that is to say: Does the code, by the use of the words "property" and "personal property," include negotiable promissory notes? In this connection it must be remembered that a special procedure is provided by Section 301, subd. 3, *supra*, under which personal property, not capable of manual delivery and in the possession of third persons, may be reached, commonly known as garnishment proceedings; but this process is limited to property not in the possession of the defendant, from which it follows that this note, having been found in defendant's possession, if attachable at all, must be reached by the sheriff taking it into his custody, as provided in subdivision 2 of Section 301 of the statute.

2. "Property" is defined as "the right and interest which a man has in lands and chattels to the exclusion of others" (2 Bouvier, Law Dict. p. 780); and "personal property" as being any right or interest which a man may have in things movable, and "includes money, chattels, things in action, and evidence of debt": 2 Bouvier, Law Dict. p. 662; *McLaughlin v. Alexander*, 2 S. D. 226 (49 N. W. 99); *Streever v. Birch*, 62 Hun, 298 (17 N. Y. Supp. 195). The word "property" is the most comprehensive of all terms which can be used, as it "is indicative and descriptive of every possible interest which the party can have": 3 Stroud, Jud. Dict. (2 ed.), p. 83; *McLaughlin v. Alexander*, 2 S. D. 226 (49 N. W. 99). It means everything of exchangeable value: 6 Words & Phrases, p. 5694. In *Willis v. Marks*, 29 Or. 493 (45 Pac. 293) it is held that a claim against an estate, verified by the original claimant and assigned to a third party, is such evidence of indebtedness as to lend to it the character of property and subject it to an action in replevin. Much stronger, then, is the reason for holding a negotiable promissory note to be personal property, which is defined by our statute (B. & C. Comp. § 4586) as "an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order

or to bearer." The advantage therefore of such instrument over a mere verified and unapproved claim, not only in value and convenience, but as to its usefulness in commerce, is too apparent to admit of discussion, and, under the decisions cited, such instrument cannot escape being classed as property and as coming clearly within the meaning of the term as used in the statute. Tiedeman, Com. Paper, § 251, construes the words "personal property," as used here, to include promissory notes, stating: "An attachment of commercial paper is also held to be permissible under a general authority to attach all kinds of property, in Oregon, Texas, New Hampshire and Wisconsin, and in other states." The statement quoted refers to no authorities in its support, but is given as the construction placed by the author upon the term "property," as used in the statute relative to attachment.

Property is recognized as including things which may be sold and that may be assessed for taxation. The Constitution of Louisiana (1868, Art. 118) provides, *inter alia*, that "all property shall be taxed in proportion to its value." When the effect of this provision was under discussion in the case of *City of New Orleans v. Mechanics' & Traders' Ins. Co.* 30 La. Ann. 876 (31 Am. Rep. 232), it was urged that "credits," including promissory notes, were not property within the meaning and intent of that article, and, accordingly, that the legislature had no authority to impose a tax upon them. The court, in passing upon the point, held promissory notes to come within the meaning of the word "property" and subject to taxation, and observed: "The argument by which it is attempted to be shown that notes, bills, bonds, stocks, etc., are not property, is too sublimated and metaphysical to be practical in matters of legislation. If they are not property, they represent value and produce revenue. But to say that our constitution forbids them to be considered as property would be to expunge from our codes provisions and principles that are as old as the civil law. * * They are classed as 'things,' may be bought, sold, appraised, seized, and make up and constitute the wealthiest patrimonies

in the world. Is it not rational, in seeking the meaning of the word 'property' in the Constitution of 1868, that we ascertain what has always been its acceptation in our law, in our jurisprudence, and by common usage? And when we ascertain that, from time immemorial, 'incorporeal things' of the kind in question have been held and treated as embraced in the term 'property,' shall we turn our back on all this and run away after the metaphysical abstraction that 'property is always and of necessity a physical actuality'? It is our duty to interpret words in a statute 'in their ordinary and usual signification,' as they are 'popularly used': C. C. 14." See, also, *Poppleton v. Yamhill County*, 8 Or. 337; *Crampton v. Newton's Estate*, 132 Mich. 149 (93 N. W. 250); *Barton v. Barton*, 32 Md. 214. In construing statutory words of common use, the same rule as there invoked has also been recognized in this state: B. & C. Comp. § 706; *City of Portland v. Meyer*, 32 Or. 368 (52 Pac. 21: 67 Am. St. Rep. 538).

Prior to 1862, the provisions of the statutes of Minnesota (sections 139, 140, Stat. 1851) relative to attachment were, in substance, the same as Sections 300 and 301, B. & C. Comp.; the only material difference being that the clause, "and not in the possession of a third person," of Section 301, B. & C. Comp., was not contained therein. The question as to the right to attach promissory notes, under the sections of the Minnesota statute then in force, by the sheriff taking the instruments into his custody and selling the same on execution, as with other property, came squarely before that court in the case of *Mower v. Stickney*, 5 Minn. 397 (Gil. 321); and in passing upon the question the court say: "Promissory notes under our statute are property, and, when they can be reached, are subject to attachment and execution, as any other species of property." The court further observes, in effect, that the holder of the note has an interest equal to its value, and that no reason appears why such interest is not subject to levy and sale upon execution. Our attention has not been directed to any other authorities. nor have we found another, in which the right to attach

promissory notes under similar statutory provisions has been considered; but we believe the interpretation given by the Minnesota supreme court to be sound and in harmony with the rule recognized in *City of Portland v. Meyer*, 32 Or. 368 (67 Am. St. Rep. 538: 52 Pac. 21), that, "in construing a statute, words of common use are ordinarily to be taken in their natural, plain and obvious signification." Nor can we conceive of any reason why the attachment of negotiable instruments as here levied upon should not be permitted. The note being in the possession of defendant at the time of the levy, without indorsements of any kind, and his individual property, no third party could have been inconvenienced in the least or in any manner injured by its attachment and sale. It is obvious that, in specifying the class of property subject to attachment, by the sheriff taking the same into his custody, the statute was intended to include instruments of this character. Counsel for defendant insists that *Mower v. Stickney*, 5 Minn. 397 (Gil. 321), is not in point, for the reason that Minnesota has a statute designating promissory notes to be within the class of property subject to attachment by levy and sale, which is true; but the provisions referred to first appeared in the code of that state in 1866, after the decision in *Mower v. Stickney*, which was rendered under the code of 1858, when the sections relative to attachment by levy and sale on execution were the same in Minnesota as now in this state, as above indicated.

3. Under the averments of the complaint, the proceedings under the entry of judgment in favor of Lewis, including the sale of the note involved, were regular, and, so far as those proceedings were concerned, conveyed to plaintiff a good and sufficient title to the note, and whether the indorsement by the sheriff to plaintiff was regular or irregular is immaterial, as plaintiff received the note under his purchase, and, whether it was indorsed or not, he is entitled, as the owner thereof, to sue in his own name (B. & C. Comp. § 4453), subject only to the exception that if it appears that the court did not have jurisdiction to enter the judgment, upon which the order of the sale

N12 § 51

was made, and under which the plaintiff came into possession of the note, the proceeding would be void, and he could not maintain action. On this point it is maintained that the allegation in the complaint, from which we have hereinbefore quoted, fails to aver that the order of the court directed the plaintiff to deposit a copy of the summons and complaint in the post office, postage prepaid, directed to his last known address, in response to which our attention is called to the following averment in the complaint:

"That on the 23d day of May, 1904, it satisfactorily appearing to the circuit court of Yamhill County, Oregon, from proofs then had and taken in open court, that service of said summons had been duly and regularly made and had upon said defendant, Arthur C. Probert, by publication thereof, in all things as by law in such cases provided and required, said defendant having not appeared and answered or otherwise pleaded to plaintiff's said complaint, but having made default, and continuing to make default, the default of said defendant was then duly entered, and thereupon, and on said 23d day of May, 1904, said plaintiff, J. G. Lewis, duly recovered judgment against said defendant, Arthur C. Probert, in said Circuit Court of the State of Oregon for Yamhill County, in said action for the sum of \$2,197.82, with interest thereon at the rate of 6 per cent per annum from March 4, 1904, until paid, for the costs and disbursements of said action taxed at \$86.80, together with an order of said court ordering and directing that said personal property belonging to said defendant, Arthur C. Probert, and attached in said action, including said promissory note above described, be sold to obtain funds with which to satisfy said judgment; said judgment being in all respects duly made, given and entered, and on said 23d day of May, 1904, duly docketed and entered in said court, in all things as by law in such cases required and provided."

4. In respect to this paragraph, counsel for plaintiff argues that it, together with other facts alleged, is sufficient to bring the case within the rule announced in *Rutenic v. Hamaker*. 40 Or. 444 (67 Pac. 196), in which it is held that, in a court of general and superior jurisdiction, every fact necessary to confer jurisdiction will be presumed, in order to support the validity of the judgment. As it is not necessary to allege facts

which the court will presume, it was not required that plaintiff in this case should set out all the facts essential to the conferring of jurisdiction in the case of *Lewis v. Probert*, through which plaintiff claims title to the note sued upon. As announced in *Rutenic v. Hamaker*, 40 Or. 444 (67 Pac. 196), there can be no question but that every presumption will be given to the proceedings in a court of general jurisdiction, necessary to support the validity of its judgments and decrees, when such court is proceeding according to the course of the common law, for which reason it was not incumbent upon plaintiff to have alleged that the court had jurisdiction, either of the person of the defendant or the subject-matter of the action, or to allege the facts conferring the jurisdiction, although necessary to aver that the court was one of general jurisdiction, describing it in such terms that this fact may appear as a necessary inference, and that judgment was obtained therein, and leave the defendant to plead and prove a want of jurisdiction, if he can: 2 Black, judgments (2 ed.), § 873; *Pennington v. Gibson*, 57 U. S. 64 (14 L. Ed. 847); *Jarris v. Robinson*, 21 Wis. 530 (94 Am. Dec. 560).

But plaintiff, in his complaint, purports to give in detail all the facts leading up to the judgment and sale upon which the statement that the judgment was duly recovered and in all respects duly made, etc., is based; and, having elected to adopt this manner of pleading; it must be complete, and state all the facts necessary to give jurisdiction, under the rule that, where the pleading points out the particular manner of service of a summons and facts relied upon to confer jurisdiction, if the mode designated falls short of all the statutory requirements, proof cannot aid the averments: *Heatherly v. Hadley*, 4 Or. 1; *Northcut v. Lemery*, 8 Or. 316. Since the method of pleading the jurisdictional facts has been used, it becomes necessary to examine into what purports to be the averments relative thereto. in order to determine whether sufficient facts appear to have given the court jurisdiction to enter the judgment, under which the sale of the note, purchased by plaintiff, was made. In this

respect the same test must be applied to the pleading of the record as may be used to determine the sufficiency of the record itself; that is, when the record or pleading, as the case may be, recites what was done, and the facts recited are insufficient to give the court jurisdiction, the omission thereof in either event is fatal to the cause of the person relying upon such record or pleading: *Tustin v. Gaunt*, 4 Or. 305.

From the complaint it appears that service of summons was made upon the defendant in the action of *Lewis v. Probert* by publication for six consecutive weeks in the Yamhill County Reporter, a newspaper of general circulation in the state; but nowhere is it manifested that a copy of the summons was immediately thereafter, or at any time, deposited in the post office, directed to the defendant at his last known post office address, or that an order was made to that effect, as required by B. & C. Comp. § 56. Nor is any reason for the failure to meet this requirement given. This brings the case clearly within the rule announced and recognized in the well-considered opinion of *Odell v. Campbell*, 9 Or. 298, in which all these features are fully discussed, and law relative thereto clearly stated. In that case, it appeared that the defendant could not be found in this state; that a cause of action existed against him, for which reason it was ordered that service be made on the defendant therein by publication of the notice for six consecutive weeks in the Oregon Statesman newspaper, but failed to direct a copy of the summons and complaint to be deposited in the post office, addressed to defendant at his place of residence; nor did the reason appear in the order, or the fact in the record, for this omission. In discussing this feature, Chief Justice LORD observes:

"The language of the statute is explicit. It requires that a copy of the summons and complaint must not only be deposited in the post office, but that it must be done forthwith, or the facts excusing the omission must appear to meet the requirements of the statute. If, for instance, the order, in addition to the facts stated as 'appearing to the judge,' had recited that 'the residence of the defendant is unknown to the affiant, and cannot, with reasonable diligence, be ascertained by him,' then the reason

for the omission, or the fact excusing the direction of deposit in the post office, would be disclosed upon the face of the record. Such an order, reciting the facts which did appear to the satisfaction of the judge, discloses affirmatively the authority of the court to exercise its extraordinary jurisdiction. But when the order of the court omits to direct a deposit in the post office, and there is nothing in the record, or in the facts recited in the order, to excuse such omission, the requirements of the statute are not complied with by mere publication. The statute contemplates, if possible, that actual notice shall be had of the pendency of the action. Deposit in the post office, directed to the residence of the defendant, would be much more likely to notify him of the pendency of the action than publication of the summons in a newspaper, however general its circulation. The reason of this direction of the statute is founded in a just regard for the rights of absent defendants, and as an additional precaution to prevent the injustice of condemning any man unheard, or without his day in court. It is not sufficient that the residence of the defendant is unknown, but it must also appear that it cannot, with reasonable diligence, be ascertained, to excuse the omission to direct the deposit in the post office. The order is an essential part of proceedings of this character, and necessary to show jurisdictional facts, without which the judgment will be a nullity. The importance, then, and the necessity of the order bearing upon its face the necessary statutory requirements, becomes evident. It must not only direct the publication in a paper designated, and for the period prescribed, but it must do more. The statute requires that it must direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the defendant at his place of residence, or the facts excusing the omission to make such direction of deposit must appear, or the order allowing service by publication, and the service and judgment following it, will be void."

5. The consequence of these allegations cannot be avoided on the ground that the judgment of a court of general jurisdiction is presumed regular, or on the presumption that there are any other or different records than those shown by the complaint. The complaint, when tested by demurrer, must be construed most strongly against the plaintiff (*Patterson v. Patterson*, 40 Or. 560: 67 Pac. 664), and the presumptions applicable to judgments in courts of general jurisdiction are applicable only

where the court is proceeding according to the course of the common law, and not where the jurisdiction has been acquired in some special manner prescribed by the statute. True, in the absence of anything in the record to the contrary, it will be presumed that service was properly had, and that the defendant appeared in person, if necessary; but when it is made to appear that the judgment was had upon a substituted service, and not upon proceedings according to the course of the common law, nothing will be presumed, but every fact necessary to give jurisdiction must affirmatively appear: *Odell v. Campbell*, 9 Or. 298. The following words by Mr. Justice FIELD (*Galpin v. Page*, 3 Sawy. 93: Fed. Cas. No. 5,206) are quoted with approval in the case last cited:

"These qualifications and exceptions arise where the proceedings, or the party against whom they are taken, are without the ordinary jurisdiction of the court, and can only be brought within it by pursuing special statutory provisions. * * When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred."

6. It appears from the order given by the court below that by the affidavit of one J. G. Lewis, the plaintiff in the action, personal service of summons could not be had on Arthur C. Probert, the defendant therein, within the State of Oregon; that Probert was not a resident of this state. But nowhere does it appear that due diligence was exercised to ascertain his whereabouts, or that his residence was unknown. The object and spirit of the statute is to give notice to the defendant, if possible, and this, accordingly, provided for the mailing to him of a copy of the summons and complaint, even though not a resident of the state, thereby fully realizing the probability of the nonresident not observing the publication of the notice, with a more favorable opportunity of receiving such notice by mail, if sent to his address. For such reason this method is prescribed and required by the code, and must be followed, unless suffi-

cient excuse appears for not doing so, which excuse would be ample, says Mr. Chief Justice LORD, in *Odell v. Campbell*, 9 Or. 298, had the order, in addition to the facts stated, recited that "the residence of the defendant is unknown to the affiant and cannot, with reasonable diligence, be ascertained by him." It is evident from the object sought by the statute that the knowledge of the defendant's whereabouts is not restricted to state lines; and it is also equally as clear that due diligence to ascertain defendant's whereabouts must appear, which is not disclosed by the complaint. We think this omission brings the case clearly within the rule announced and recognized in *Odell v. Campbell*, from which it follows that the complaint is clearly inadequate to show jurisdiction of the court in the entering of the judgment in *Lewis v. Probert*, and in the ordering of the sale, under which the note here sued upon was purchased.

7. The complaint is therefore insufficient, and no error was committed in sustaining the demurrer; but, under the judicial discretion recognized and rule announced in *Powell v. Dayton S. & G. R. Co.* 14 Or. 22 (12 Pac. 83) and *State ex rel. v. Richardson*, 48 Or. 309 (85 Pac. 225), the cause should be remanded for such further proceedings as may be deemed necessary, not inconsistent with this opinion.

AFFIRMED AND REMANDED.

Decided 17 December, 1907.

MCNEAR v. GUISTIN.

92 Pac. 1075.

ADVERSE POSSESSION—ELEMENTS.

1. Occupancy of land necessary to constitute title by adverse possession, must be so open and exclusive as to leave no inquiry as to occupant's intention, so notorious that the owner may be presumed to have knowledge that the occupancy is adverse, and so continuous as to have furnished a cause of action every day during the required period. Acts less continuous and of brief duration, do not constitute such occupancy as would ripen into a title by adverse possession.

SAME—SUFFICIENCY OF EVIDENCE.

2. Evidence in a suit to determine an adverse claim to real estate, to the effect that defendant had visited the land forty or fifty times in ten years, occasionally pruning a few fruit trees and planting one or two sacks of potatoes, held, not to show occupancy by defendant sufficient to acquire title by adverse possession.

From Clackamas: THOMAS A. McBRIDE, Judge.

Suit by George P. McNear to determine an adverse claim to real estate. A decree was rendered in favor of plaintiff, and defendant appeals. **AFFIRMED.**

For respondent there was a brief over the names of *Gammans & Malarkey*, with an oral argument by *Mr. George G. Gammans*.

For appellant there was a brief and an oral argument by *Mr. Theodore J. Geisler*.

Opinion by MR. CHIEF JUSTICE BEAN.

This is a suit to determine an adverse claim to 160 acres of land in Clackamas County. The complaint avers that plaintiff is the owner in fee of the land in question; that it is not in the actual possession of another; that defendant claims an interest or estate therein adverse to plaintiff, without legal or equitable right, and prays that he be required to appear and set up his claim and that the same be adjudged to be invalid. The defendant pleads title by adverse possession to a small portion of the land described in the complaint. The reply put in issue the averments of the answer, and upon the trial a decree was rendered in favor of plaintiff, from which defendant appeals.

1. The land described in the complaint is wild, unimproved land, patented to the Oregon & California Railroad Company under the act of congress of July 25, 1886 (14 Stat. U. S. 239), granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Line, in California, to Portland, in this State. The plaintiff succeeded by mesne conveyances, in 1891, to the title to the railroad company, and has ever since claimed to own the land and paid the taxes thereon. Prior to the decision of the Supreme Court in January, 1900 (*United States v. Oregon & California R. Co.* 176 U. S. 28: 20 Sup. Ct. 261: 44 L. Ed. 358), a controversy existed as to whether the particular land in dispute was within the limits of the railroad grant. In the spring of 1892, defendant, claiming that it was public land, entered thereon, constructed a small frame house, 14x24, cleared off trees and brush, fenced and

planted to fruit trees a small part of the land, variously estimated by the witnesses to be from three to eight acres, and in October, 1893, applied to enter the entire 160 acres under the homestead laws. His filing was never accepted, however, for the reason that the land passed to the railroad company under the act of congress referred to, but he now claims title by adverse possession to that portion inclosed by his fence. He never at any time resided on the land. At the time of his alleged entry in 1892, he was, and ever since has been, living in Portland, and engaged in business in that city. He kept a hired man on the land for perhaps two years, during 1892-93, since which time it has been unoccupied; the defendant visiting it at intervals of a few months and remaining a short time, but doing no work thereon, except to occasionally prune and cultivate the fruit trees or plant a sack or two of potatoes. He says:

"Every year I go there and cultivate my fruit trees and my vineyard, and I also plant a sack or two of potatoes for my own use. * * I have not got much out of it, and I used to give it to the neighbors, and I did it to cultivate the land and to have possession of it. * * I have been living on the ranch over 40 or 50 days, and sleeping in the house; maybe more, not less than 40 or 50 times I go there and stay on the place, and I have a man on my place to do the work. * * At the beginning, when we commenced to clear the land, * * I go there myself just what was necessary to keep the land. I never left a day that I wasn't there without hard work, just as good as any farmer."

J. N. Davis examined the land in March, 1902, with the view of purchasing it from plaintiff, and he testifies that he saw no indication that it was occupied, and thought it to have been abandoned; that the place was in a dilapidated condition, and there was nothing to show that any work had been done on it for years; that there were some fruit trees growing thereon, but they did not appear to have been pruned or cultivated. E. C. Maddock and B. F. Halstead both testified that in October, 1903, the orchard had grown up with ferns and weeds, and there were no indications at that time that the place was occupied, ^{at that a} remain in had the appearance of having been abandoned. ^{citizen.}

Upon these facts, two contentions are made: (1) That defendant was in actual possession of the disputed premises at the time this suit was commenced, and therefore the court is without jurisdiction; (2) that he has acquired title by adverse possession to the small tract inclosed by fence. These two questions may be treated as one for the purposes of this suit. The defendant does not claim actual possession at the time the suit was instituted different from that claimed by him for the previous ten years, and, unless he has been in possession during that time, he was not at the commencement of the suit. It is only necessary, then, to determine whether, under the evidence, defendant's alleged possession, since 1892, has been such as would ripen into a title by adverse possession, assuming all other required elements to exist. Occupancy of land necessary to constitute a title by adverse possession must be continuous, open, notorious and exclusive, during the entire time required by the statute of limitations. There is no particular manner by which such possession may be indicated or made manifest, and no particular act or series of acts are required to be done on the land. There must, however, be actual use and occupancy, continuous for the necessary length of time, of such an unequivocal character as will indicate to the owner an assertion of an exclusive appropriation and ownership. In short, the acts of the alleged occupant must be so open and exclusive as to leave no inquiry as to his intention, so notorious that the owner may be presumed to have knowledge that the occupancy is adverse, and so continuous as to have furnished a cause of action every day during the required period. Acts not so continuous and of brief duration do not constitute such an adverse possession as is contemplated by law: 1 Cyc. 984; *Adams v. Clapp*, 87 Me. 316 (32 N. E. 911); *Elyton Land Co. v. Denny*, 108 Ala. 553 (18 South. 561); *Bynum v. Hewlett*, 137 Ala. 333 (34 South. 391); *Barr v. Potter*, 57 S. W. 478; *Cox v. Ward*, 107 N. C. 507 (12 S. E. 379); *Wickliffe v. that* R. Mon. 253.

by these requirements, it is clear that defendant's frame h. is not sufficient to acquire title by adverse posses-

sion. His acts of possession, according to his own testimony, were disconnected, at irregular intervals, and of brief duration, and not of an open, notorious, exclusive and continuous character demanded by the law. Visiting the land forty or fifty times in ten years, and occasionally pruning a few fruit trees and planting a sack or two of potatoes, was not such an assertion of title as would continually expose him to an action for possession by the true owner, and a constant liability to such an action is made by many authorities essential evidence of a right to claim the benefit of the statute of limitations.

The decree will be affirmed.

AFFIRMED.

Argued 22 October, decided 17 December, 1907.

STATE v. BAKER.

92 Pac. 1076; 18 L. R. A. (N. S.) 1040.

INTOXICATING LIQUORS—REGULATION—CITY CHARTER AND GENERAL LAW.

1. The charter of Portland authorizing such city to exercise, within its limits, police powers, to the same extent as the State has or could exercise such powers, and to regulate saloons and saloonkeepers, having no words of exclusion or restriction concerning the exercise of the power thus conferred, (Laws 1905, p. 32), does not repeal or affect the general laws on the same subject, or prevent a prosecution for a violation thereof within the city.

SAME.

2. The clause of the charter of Portland, that no provision of the law concerning the sale or disposition of liquors in the county in which said city is situate, shall apply to said city, has no reference to legislation under the police powers regulating and controlling the places where, or the persons by whom such liquors are sold.

SAME—SALOONS.

3. A room used by saloonkeepers in connection with their saloon business is part of the saloon, within Laws 1905, p. 327, making it an offense for saloonkeepers to permit a female under the age of 21 years to remain in or about the saloon.

STATUTES—SPECIAL LEGISLATION.

4. Laws 1905, p. 327, making it an offense for proprietors of places where liquor is kept for sale at retail, to permit a female under the age of 21 years to remain in or about the place, is not special legislation because excepting therefrom any open and public restaurant or dining room; this being a classification that the State in the exercise of its police powers can lawfully make.

CONSTITUTIONAL LAW—EQUAL PRIVILEGES.

5. Laws 1905, p. 327, making it an offense to permit a female under the age of 21 years to remain in a saloon, is not invalid because of the fact that a female attains her majority at the age of 18; the right to enter and remain in a saloon not being one of the equal privileges granted to every citizen.

INTOXICATING LIQUORS—PERMITTING WOMEN ABOUT SALOONS.

6. Laws 1905, p. 327, making it an offense to permit a female under the age of 21 years to remain in or about a saloon, is not void as unreasonable, because making no distinction dependent on the purpose of the visit; but is a regulation clearly within the police power.

SAME—EVIDENCE.

7. On a prosecution for permitting a female to remain in a saloon, in violation of Laws 1905, p. 327, evidence that while she was there, defendants sold her beer, is competent as an essential part of the transaction, and tending to show that they were engaged in selling intoxicating liquors, and that they permitted her to remain in the saloon.

CRIMINAL LAW—INSTRUCTIONS—ASSUMPTION OF FACTS.

8. The fact that the female was under the age of 21 years is not assumed by the instruction on a prosecution under Laws, 1905, p. 327, making it an offense to permit a female under such age to remain in a saloon; that the question to be determined was whether defendants were the owners of a saloon, and whether they permitted P. (the female), who was, in fact, under the age of 21 years, to remain in their saloon.

WORDS AND PHRASES—SALOON.

9. A "saloon" is a building or place where liquors are kept for sale at retail, and may include more than one room—citing Words and Phrases, vol 7, p. 6810.

From Multnomah: A. F. SEARS, JR., Judge.

Defendants were accused of permitting a female under the age of 21 years, to remain in and about a saloon kept by them in the City of Portland. From a conviction, defendants appeal.

AFFIRMED.

For appellant there was a brief over the names of *Dufur & Riddell*, with an oral argument by *Mr. Enoch B. Dufur*.

For the State there was a brief over the names of *Mr. John Manning*, District Attorney, *Mr. Gus C. Moser*, Deputy District Attorney, and *Mr. Andrew M. Crawford*, Attorney General, with an oral argument by *Mr. Gus C. Moser*.

Opinion by MR. CHIEF JUSTICE BEAN.

The defendants were tried and convicted of the crime of permitting Pauline Wyman, a female under the age of 21 years, to remain in and about a saloon kept by them in the City of Portland. The prosecution is based upon an act of the legislature of 1905 (Gen. Laws 1905, pp. 327, 328), Section 1 of which provides as follows:

"If any owner or proprietor of any saloon or other place where intoxicating liquor is kept for sale at retail, or any servant or employee, or agent of such owner or proprietor, shall suffer or permit any female under the age of 21 years to remain in or about such saloon, or any place where intoxicating liquor

is kept for sale at retail, or any box or room used in connection with such saloon, or place in which intoxicating liquor is served, or if any person sell or give to any female under the age of 21 years, in any saloon or place where intoxicating liquor is kept for sale at retail, any intoxicating liquor, such person, upon conviction thereof, shall be fined not less than \$100, or more than \$1,000, or be imprisoned in the county jail not less than three months or more than one year; provided, however, that the provisions of this act shall not apply to any female accompanied by her husband or parent, or to any open and public restaurant or dining-room."

The evidence for the state showed that at the time of the commission of the alleged offense defendants were conducting a saloon in the City of Portland, where intoxicating liquors were sold at retail. In connection with their saloon they had a room adjoining and opening out of the barroom provided with tables and chairs, where liquors and luncheons, when ordered, were served to their customers. There were two entrances to the saloon, one from Third Street into the barroom proper, and the other from Taylor Street into the adjoining room. About 10 o'clock on the evening of April 28, 1906. Pauline Wyman and another young woman, each under the age of 21 years, accompanied by a man, went into the room adjoining the barroom, where they remained for about ten minutes and were served with beer by defendant Baker. At the close of the state's case, the defendants' counsel moved the court to direct a verdict of not guilty upon the grounds (1) that the court was without jurisdiction; (2) that the proof did not show the commission of a crime; and (3) that the act under which the prosecution was had is unconstitutional and void. The overruling of this motion is assigned as error.

1. The first point made is without merit. By its charter the City of Portland is authorized to exercise within the limits of the city, police powers to the same extent as the State has or could exercise such powers, and the right to regulate all bartenders, saloon keepers and dealers in spirituous, fermented, vinous or malt liquors, and the barrooms, drinking shops or places where such liquors are kept or sold: Laws 1903, p. 32.

There are no words of exclusion or restriction in the charter concerning the exercise of the power thus conferred, and therefore it does not repeal or affect the general laws of the state on the same subject or prevent a prosecution for a violation thereof within the limits of the municipality: 14 Am. & Eng. Ency. 605; *State v. Ayers*, 49 Or. 61 (10 L. R. A., N. S., 992: 88 Pac. 653); *State v. Bergman*, 6 Or. 341; *State v. Sly*, 4 Or. 277; *Burchard v. State*, 2 Or. 78.

2. The clause of the charter that no provision of the law concerning the sale or disposition of liquors in Multnomah County shall apply to the City of Portland, has no reference to legislation under the police powers regulating and controlling the places where, or persons by whom, such liquors are sold.

3. The second point is that the evidence for the state shows that the prosecutrix was not permitted by defendants to remain in the saloon, but in a room adjoining. Speaking generally, a saloon is a building or place where liquors are kept for sale at retail, and may include more than one room: 7 *Adjudged Words & Phrases*, 6310. The room in which the crime is alleged to have been committed was used by defendants in connection with their saloon business, and was, therefore, for the purpose of this prosecution, a part of the saloon.

4. Several objections are made against the constitutionality of the law under which the prosecution is maintained. First, it is said that it is a special law for the punishment of crimes and misdemeanors, because it does not apply to open and public restaurants or dining rooms. But this is a classification the state, in the exercise of its police powers, could lawfully make. The right to engage in the sale of intoxicating liquors is not one of the privileges guaranteed to the citizen by the state or federal constitution. It is a business attended with danger to the morals of the community, and may, therefore, be entirely prohibited or permitted by the state under such conditions or limitations as in the judgment of the lawmaking power will limit or minimize the evils arising therefrom: *Sandys v. Williams*, 46 Or. 327 (80 Pac. 642); *Crowley v. Christensen*, 137 U. S. 86 (11 Sup. Ct. 13: 34 L. Ed. 620). And, so long as

the law operates alike upon all persons similarly situated, it is not subject to the objections of special or class legislation: *State v. Muller*, 48 Or. 252 (85 Pac. 855); *In re Oberg*, 21 Or. 406 (28 Pac. 130: 14 L. R. A. 577); *State v. Randolph*, 23 Or. 74 (31 Pac. 201: 17 L. R. A. 470: 37 Am. St. Rep. 655).

5. Again, the contention is made that the law is invalid because it applies to all females under the age of 21 years, while by the general law a female is deemed to have arrived at majority at the age of 18, and thereafter to have control of her own actions and business, and to have all the rights and be subject to all the liabilities of a citizen of full age: B. & C. Comp. § 5330. The act in question is not to establish or change the age of majority of females, but for the purpose of promoting good morals and sound policy. Its object is to suppress the evils incident to the frequenting of saloons by women. The vicious tendency of the mingling of men and women in saloons places where intoxicating liquors are sold, is regarded as harmful to good morals, and therefore a law which prohibits the licensing of a female to engage in the business of retailing intoxicating liquors, or making it an offense to employ a female to serve liquors in a saloon, or to permit a female to enter a saloon and there be served with liquors, is not unconstitutional: *Blair v. Kilpatrick*, 40 Ind. 315; *Welsh v. State*, 126 Ind. 71 (25 N. E. 883: 9 L. R. A. 664); *Bergman v. Cleveland*, 39 Ohio St. 651; *State v. Considine*, 16 Wash. 358 (47 Pac. 755); *In re Considine* (C. C.), 83 Fed. 157; *Adams v. Cronin*, 29 Colo. 488 (69 Pac. 590: 63 L. R. A. 61). The liberties or rights of every citizen are subject to such limitations in their enjoyment as will prevent them from being dangerous or harmful to the body politic, and there is no objection to the law in question that it applies to women of lawful age. This answers the question that, as the law permits males of full age to enter and remain in a saloon and denies such right to women, it is in violation of the constitutional provision guaranteeing to every citizen equal privileges and immunities. By nature citizens are divided into the two great classes of men and women, and the recognition of

this classification by laws having for their object the promoting of the general welfare and good morals, does not constitute an unjust discrimination. A police regulation to prevent immorality and for the good of the community based upon such classification is proper; and, as Mr. Cooley says: "Under the police power, some employments may be admissible for males and improper for females, and regulations recognizing the impropriety and forbidding women from engaging in them would be open to no reasonable objection": Cooley, Const. Lim. 745.

6. It is also urged that the law is void because it is arbitrary and unreasonable, since it makes it a crime for the proprietor of a saloon to permit a female under the age of 21 years to remain in or about his saloon regardless of her business or the purpose which took her there, and *State v. Nelson*, 10 Idaho, 522 (79 Pac. 79: 67 L. R. A. 808: 109 Am. St. Rep. 226) is cited in support of this contention. The law under consideration in that case was a municipal ordinance making it unlawful for a person keeping a saloon to permit females to enter his place of business, and the court declared the ordinance unreasonable and void, because it would apply to women who might find it necessary to enter a saloon for a lawful and proper purpose. But the law challenged here is a legislative act, and does not make it an offense to permit a female to enter a saloon but to remain in or about such a place, which is essentially different from the ordinance declared void by the Idaho court, and is a regulation clearly within the police powers of the State.

7. This disposes of the principal arguments relied upon by defendants for a reversal of the judgment against them, but there are some questions of procedure which require notice. The court below allowed the prosecution to prove, over the objection of defendants, that, while Pauline Wyman and her companions were in the saloon, defendants sold them beer. This evidence was, we think, competent as an essential part of the transaction (*State v. O'Donnell*, 36 Or. 224: 61 Pac. 892), and tending to show that defendants were engaged in the sale of intox-

icating liquors, and that they permitted prosecutrix to remain in their saloon.

8. The objection that the court in its instruction to the jury assumed that the prosecutrix was, in fact, under the age of 21 years, a question to be determined by the jury on the testimony, is, we think, a misconstruction of the charge. After a statement of the general principles of law, by which the jury were to be governed in arriving at a verdict, the court said the question to be determined was whether "one or both of these men were the owners and proprietors of a saloon or a place where liquors intoxicants were sold, and sold at retail, and whether they did permit, one or both of them, Pauline Wyman, was, in fact, under the age of 21 years, to remain in their saloon. And as I say, by remain, to remain for an appreciable length of time. There is no particular time fixed by law. And whether she was accompanied by her husband or her parent; and also it is incumbent upon the State to show that this was not a public restaurant. If the State has satisfied you to a moral certainty that those facts exist, then it would be your duty in obedience to your oaths to return a verdict of not guilty, but, if you have a reasonable doubt as to any of those circumstances, why, you should return a verdict of not guilty as to one, or both defendants, and that is all there is in this case."

9. The clear import of this language is that, if the jury were satisfied to a moral certainty that defendants were the proprietors of a saloon where intoxicating liquors were sold and permitted the prosecutrix to remain in such saloon, and she was under the age of 21 years, and not accompanied by her husband or her parents, they should find a verdict of guilty, otherwise they should acquit.

There are some minor points made in the brief. We have examined them with care, and conclude that they are without merit.

Judgment affirmed.

AFFIRMED.

Argued 15 October, decided 17 December, 1907; rehearing denied March 10, 1908.

DE ROBOAM v. SCHMIDTLIN.

92 Pac. 1082.

TRUSTS—RESULTING TRUSTS—PAYMENT OF CONSIDERATION FOR CONVEYANCE TO ANOTHER.

1. As a general rule, where one person purchases real estate and pays the purchase price, but takes the deed in the name of another, a resulting trust arises by operation of law in favor of the one furnishing the purchase money.

SAME—EVIDENCE TO ESTABLISH—PAROL EVIDENCE.

2. Such a trust is exempt from the operation of the statute of frauds, and may be shown by parol.

SAME—RELATIONSHIP BETWEEN PARTIES—PRESUMPTIONS.

3. Where a deed is taken in the name of one whom the person paying the purchase money is under a legal or moral obligation to provide for, as a wife or child, the presumption is that the purchase was intended as an advancement or settlement, and not in trust for the person furnishing the money, and evidence to overcome this presumption must be of the most satisfactory kind.

SAME—TIME OF PAYMENT.

4. It is indispensable to the establishment of a trust that payment of the purchase price should actually be made by the person asserting the trust, or that a binding obligation therefor be incurred by him as part of the original transaction at or before the time of conveyance; payment at some subsequent time not being sufficient.

SAME—WEIGHT AND SUFFICIENCY OF EVIDENCE.

5. Evidence to establish a resulting trust must be clear and convincing, and when the testimony is in doubt, or the evidence conflicting, the legal title must prevail. Evidence examined and held insufficient to establish a resulting trust in favor of a husband in land conveyed to his wife.

From Jackson: HIERO K. HANNA, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a suit in equity filed by plaintiff to establish his title to certain real estate in Jackson County against the claim of defendant, Augustine Schmidlin. On April 14, 1884, Jane Holt died intestate, leaving surviving her a husband, George W. Holt. At the time of her death she was the proprietor, and she and her husband were the owners by joint deed, of the United States Hotel in Jacksonville. This property was at the time encumbered by mortgages and judgment liens amounting to practically its full value. The plaintiff is a brother of Mrs. Holt, and came to Jackson County without means in 1871. The following year he married a Mrs. Schmidlin, who owned and was living upon a farm near Jacksonville. He continued

to live on this farm with his wife until shortly after his sister's death, when they moved to Jacksonville, and took possession and management of the hotel. They had no property at that time except the farm. On June 14, 1884, plaintiff was appointed administrator of the estate of his sister on petition of her husband. Seven days later, and on the 21st of the same month, plaintiff and his wife executed and delivered to Louis Solomon a mortgage on her farm to secure the payment of their joint and several promissory note for \$3,700. No money was borrowed by them of Solomon at the time, but on the day of the execution of the mortgage, and on the 23d day of June and the 2d of July, respectively, mortgages on the hotel property, given by Mrs. Holt and her husband to Reames Brothers for \$1,614, Kubli for \$977.59, and a judgment lien thereon in favor of Orth for \$1,043.18, were assigned by the respective owners thereof to Solomon. On December 1, 1884, two prior mortgages on the same property, in favor of Jerry and Delia Nunan, respectively, were assigned by the owner to A. L. Reuter. Plaintiff continued to act as administrator of the estate of his sister until March 9, 1885, when he was removed by the county court for incompetency, and on April 25th following a suit was commenced by the attorneys of himself and wife in the name of Solomon to foreclose the Reames and Kubli mortgages, and for a decree for the sale of the hotel property to satisfy the amount due thereon, and on the Orth judgment. Plaintiff, as administrator of the estate of Mrs. Holt, G. W. Holt, her husband, Reuter, assignee of the Nunan mortgages, and plaintiff's wife, who was assignee of a mortgage in favor of Drum, were made defendants, and all acknowledged service of summons. On May 12, 1885, a decree of foreclosure was entered by default, and the hotel property ordered sold, subject to the two prior mortgages in favor of Nunan and which had been assigned to Reuter, to satisfy the amount due on the Reames and Kubli mortgages, the Orth judgment, and the mortgage in favor of plaintiff's wife. On the 16th an execution was issued on this decree under which

the property was, on June 20th, sold to plaintiff's wife for \$4,325. No money was paid by her or any one else on this sale, except \$74.30 for fees, costs and expenses of the sale. The amount purporting to be due on the Reames and Kubli mortgages and Orth judgment, amounting to \$3,695.12, was satisfied by Solomon's receipt to the sheriff, and the amount of the Drum mortgage owned by Mrs. De Roboam was likewise satisfied by her receipt for \$555.58. The attorney's fees amounting to \$432 were subsequently paid by plaintiff and his wife. On the next day after the sale plaintiff and his wife executed and delivered to Solomon a mortgage on the hotel property to secure the payment of their promissory note for \$3,700, made June 21, 1884, and secured by mortgage on Mrs. De Roboam's farm. On December 15, 1885, the interest and \$1,700 on the principal was paid on the original mortgage to Solomon, and on the same day it was assigned by him to Reuter.

On April 2, 1886, a sheriff's deed to Mrs. De Roboam for the hotel property was filed for record, and on the same day she and her husband gave their joint note to Reuter for \$4,000, secured by a mortgage on the hotel property and her farm, and Reuter satisfied of record the Nunan mortgage for \$2,000, the other one for \$500 having been satisfied by him on March 5th previously, and also satisfied the mortgage assigned to him by Solomon. Plaintiff and his wife continued thereafter to operate and manage the hotel until her death in October, 1900. About the time they took possession of the hotel, or soon thereafter, the plaintiff secured a contract from the county for keeping the poor. These people were kept on his wife's farm, and were fed from the hotel. "What I take out to throw away my cook fix it up nice and brought it to the poor with a buggy," says plaintiff. From the proceeds of this contract, the income from the hotel and a saloon annexed, payments were made from time to time on the Reuter mortgage, and it was finally paid and satisfied of record on April 5, 1888. Mrs. De Roboam left a will in which she devised the hotel property and furniture to plaintiff during his natural life, and at his death to her son,

Augustine Schmidlin, the defendant in this suit. In April, 1904, this suit was commenced for the purpose of charging the defendant, as trustee of the property in question, on the theory that plaintiff paid the consideration for the purchase thereof by his wife at the sale under the decree in the Solomon foreclosure suit, and that she took the title in trust for him. Plaintiff had decree in the court below, and defendant appeals.

REVERSED.

For appellant there was a brief over the names of *James R. Neil and Watson & Beekman*, with an oral argument by *Mr. Edward B. Watson*.

For respondent there was a brief over the names of *Colvig & Durham*, with an oral argument by *Mr. Wm. M. Colvig*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

The legal title of the property in controversy passed to *Mrs. De Roboam* by her purchase at the foreclosure sale, and the subsequent execution and delivery to her of a sheriff's deed therefor. She did not convey it during her lifetime. *Prima facie* therefore the title passed to defendant under her will. Plaintiff insists, however, that the purchase was made by his wife for his benefit, and that he paid the purchase price, and the title taken in her name under an agreement, whereby a resulting trust was created in his favor.

1. The questions for decision therefore are, whose money paid for the property, and if it was paid for by plaintiff was the title taken in the name of his wife, under such circumstances as will rebut the presumption that it was intended as an advancement? As a general rule, where one person purchases real estate and pays the purchase price, but takes the deed in the name of another, a resulting trust arises by operation of law in favor of the one who furnished the purchase money.

2. The person in whose name the title is taken becomes a trustee for the one who paid the money, and the trust so created is exempt from the operation of statute of frauds and may be shown by parol.

3. But when the deed is taken in the name of one whom the person paying the purchase money is under a legal or moral obligation to provide for, as a wife or child, the presumption is that the purchase was intended as an advancement or settlement, and not in trust for the person furnishing the money. This presumption may be overcome by testimony, but to have that effect the evidence must be of the most convincing and satisfactory kind: *Parker v. Newitt*, 18 Or. 274 (23 Pac. 246); *Barger v. Barger*, 30 Or. 268 (47 Pac. 702). These principles are elementary, and it only remains to apply them to the fact as shown by the testimony.

All the parties to the several transactions out of which the controversy arose are dead, excepting plaintiff. He can neither read nor write, and is compelled to testify from an imperfect recollection of matters occurring 20 years ago. He says that he desired to purchase the property himself at the foreclosure sale, but was advised by his attorney that he could not do so because he was administrator of his sister's estate, although he had in fact been removed some months previous, of which, however, he claims to have been ignorant, and acting upon the advice of his counsel he requested his wife to bid the property in for him. He does not claim that he actually furnished any part of the purchase price, or was able to do so, but his contention is that before the sale he arranged with A. L. Reuter to furnish the money, and that Reuter did so, and that he subsequently repaid him. But in this it seems quite clear that his memory is at fault. The record shows that no money whatever was paid at the time of the sale, except a few dollars for costs, furnished, presumably, by the purchaser, Mrs. De Roboam. The claim of the execution creditor Solomon was satisfied by the mortgage given by Mrs. De Roboam on her separate property some months prior to the sale, and an additional mortgage to secure the same indebtedness on the hotel property made the day thereafter. This mortgage remained in the name of Solomon, and was not acquired by Reuter until December 15 following. It is therefore manifest that Reuter did not furnish

any money at the time of the sale with which to make the purchase, but that the purchase price was paid by Mrs. De Roboam, receipting to the sheriff for the amount due her on her mortgage and a note to Solomon secured by mortgages on her property.

4. There is evidence on behalf of plaintiff, which he claims tends to show that he subsequently paid the Solomon mortgage, and the other liens on the property. But these payments were made out of the proceeds of the business conducted by himself and wife, and there is much evidence tending to show that she was the head of the firm. But, however that may be, a subsequent payment by plaintiff of the indebtedness incurred by his wife for the purchase price of the property, would not be sufficient to create a resulting trust in favor of him. It is indispensable to the establishment of a trust that payment of the purchase price should actually be made by the person asserting the trust or a binding obligation therefor incurred by him as part of the original transaction at or before the time of conveyance. Payment at some subsequent time is not sufficient: *Pomeroy*, Eq. Juris. § 1037; *Sisemore v. Pelton*, 17 Or. 546 (21 Pac. 667); *Taylor v. Miles*, 19 Or. 550 (25 Pac. 143). The plaintiff does not claim that he entered into any binding obligation with Reuter at or before the purchase of the property by his wife to repay him the purchase money, but he expressly says that Reuter refused to loan him any money unless his wife would go security, and the record shows that his wife did not incur any liability to Reuter until April 2, 1886, after she had secured the sheriff's deed for the property.

5. In view of the rule that evidence to establish a resulting trust must be clear and convincing, and when the testimony is in doubt, or the evidence conflicting, the legal title must prevail (*Snider v. Johnson*, 25 Or. 328: 35 Pac. 846), we are of the opinion that plaintiff has failed to make out a case entitling him to relief in equity, and the decree of the court below must be reversed, and the complaint dismissed.

REVERSED.

Decided 17 December, 1907.

COOPER v. BLAIR.

92 Pac. 1074.

ADVERSE POSSESSION—ACQUISITION OF RIGHTS BY PRESCRIPTION.

1. Purchasers of a farm, under whom plaintiff and defendant respectively claimed, mutually agreed that one should take that part lying west of a certain road and south of another road, and the other purchaser the remainder. Before the deeds were made a survey was had. After the survey deeds were made to the purchasers, intending to use the description furnished by the surveyor, and the purchasers immediately entered into possession, and they and their successors in interest occupied the same without question for at least sixteen years, when it was discovered that, as defendant asserted, about twenty-three acres south of the road, and which had been in possession of plaintiff and his predecessors in interest, were included in the description of land conveyed to defendant's grantor, and she thereupon set up title to the same. *Held*, that the occupancy of plaintiff and his predecessors in interest gave him title by adverse possession, regardless of the descriptions in the deeds, and notwithstanding that because of error in the descriptions or in the calculation of the area, one of the purchasers paid for more land than she acquired and the other for less.

QUIETING TITLE—PLEADING—DEPARTURE.

2. In a suit under Section 516, B. & O. Comp., to determine an adverse claim to real estate, a reply setting up adverse possession, was no departure from the complaint, wherein it was alleged that plaintiff was the owner and in possession of the property, and that defendant claimed an adverse interest.

SAME—ADMISSIBILITY OF EVIDENCE.

3. In a suit to determine an adverse claim to real estate, wherein plaintiff claimed title by adverse possession, evidence by defendant to establish her ownership by common reputation, referring principally to discussions among her neighbors, is inadmissible.

From Marion: WILLIAM GALLOWAY, Judge.

Suit by W. C. Cooper to determine an adverse claim to real property. There was a decree for defendant, from which the plaintiff appeals.

REVERSED: DECREE RENDERED.

For appellant there was a brief over the names of *McCain & Vinton* and *Mr. George G. Bingham*, with oral arguments by *Mr. McCain* and *Mr. Bingham*.

For respondent there was a brief and oral arguments by *Mr. William H. Holmes* and *Mr. Webster Holmes*.

Opinion by MR. CHIEF JUSTICE BEAN.

This is a suit to determine an adverse claim to real estate. The plaintiff alleges that he is the owner, and in possession of the property in controversy, and that defendant claims an estate or interest therein adverse to him. The defendant denies

plaintiff's ownership and possession, and sets up title and possession in herself, and prays for a decree quieting her title. Plaintiff in his reply denies the averments of the answer, and alleges that he and his predecessors in interest have been in adverse possession for the statutory time. The defendant had decree in the court below, and plaintiff appeals.

1. There is no substantial controversy upon the important and controlling facts. In 1888 Joab Bealer was the owner of a farm of 360 acres in Yamhill County, which he sold to one David May and Mrs. McCormack, defendant's mother, for a certain sum per acre. By mutual agreement of the purchasers May was to take that part of the farm lying west of the Amity and Perrydale road and south of the Jellison road, and Mrs. McCormack the remainder. Before the deeds were made, a surveyor was employed to run out and establish the boundaries, and estimate the area of each tract. After the surveying was completed, and early in the spring of 1888, deeds were made by Bealer to the respective purchasers, intending to use the description furnished by the surveyor, and the purchasers immediately entered into possession of their several tracts, and they and their successors in interest have continued to occupy, cultivate and farm the same, without question, until about 1904, when it was discovered that, as defendant asserts, about 23 acres of the land south of the Jellison road, and which had been in the possession of May and his successors in interest since 1888, was included in the description of land conveyed by Bealer to her grantor. She thereupon set up title to such land, and attempted to take possession thereof, and the object of this suit is to determine the rights of the respective parties thereto.

The plaintiff claims that the land in controversy is within the description as contained in the deed from Bealer to May and subsequent conveyances, when properly interpreted. But we deem it unnecessary to consider that question. It is undisputed, however, that it was so intended by all the parties. The surveyor testifies that, when he came to establish the lines, he was informed by both of the purchasers that the Jellison road

was to be the dividing line, and in making the survey in which he was assisted by May and the agent of Mrs. McCormack, he intended to, and did, follow such road; and in this he is corroborated by May, the only other witness testifying upon the subject.

Immediately upon the making of the deed to him, May went into possession of the land south of the Jellison road, and he and his successors in interest have ever since been in the open, notorious, exclusive and continuous possession thereof, claiming the title. May says he lived on the place himself for 16 years, and always understood that his land extended to the Jellison road, and that he improved and cultivated up to that line. The defendant, who succeeded to Mrs. McCormack's title in May, 1888, and has ever since lived within a short distance of the land in controversy, says that she supposed all her land was north of the Jellison road until two or three years ago, and that she knew May and his grantees were occupying and claiming title to all the land south of the road and she made no objection thereto.

It is clear, therefore, that the occupancy of plaintiff and his predecessors in interest has been such as to give him title by adverse possession, regardless of the description in the deeds, under which he holds, and this is all that is necessary for the purposes of this suit. This is not, as counsel for defendant argues, a case of a mere disputed boundary, nor that of the occupancy of land under a mistake as to the true boundary. There was no mistake as to the actual boundary of the land purchased and occupied by May and his successors in interest, and to which they claimed title. The mistake, if any, was in the description in their deeds, and not in the land intended to be conveyed. Nor was possession taken in accordance with the description contained in the deeds, but the deeds were intended to describe the land actually occupied, and a mistake therein could not affect the character of the occupancy. Nor is the fact that because of an error in the description or in the calculation of the area, one of the purchasers paid for more land than she

acquired title to, and the other for less, material in determining the question of title. If defendant's predecessor in interest purchased a certain definite tract of land, and by mistake paid for more than she purchased, she may have had a claim against her grantor to recover the overplus, but it would not give her title to any part of the land sold to May, nor would the fact that May did not pay for all the land he purchased defeat his title or transfer it to another.

2. A claim is made that, because plaintiff did not set up adverse possession in his complaint, he could not show it on the trial, and that his reply is for that reason a departure. But it is not necessary for a plaintiff proceeding under Section 516, B. & C. Comp., to determine an adverse claim to real estate to plead the source of his title. It is sufficient if he alleges his ownership and possession, and that defendant claims an interest or estate adverse to him: *Zumwalt v. Madden*, 23 Or. 185 (31 Pac. 400). Under such a complaint, he may prove his title, if it is controverted in any manner authorized by law, and proof of adverse possession for the statutory time will be sufficient: *Joy v. Stump*, 14 Or. 361 (12 Pac. 929); *Barrell v. Title Guarantee Company*, 27 Or. 77 (39 Pac. 992).

3. The defendant sought to prove her ownership of the disputed premises by common reputation. This evidence referred principally to discussions among her neighbors, after the alleged error in the description was discovered, and was not evidence of title (*Sample v. Robb*, 16 Pa. St. 305); and as said by the Supreme Court of Michigan in a somewhat similar case, did not "have any bearing upon the character of the occupancy of the parties, as affecting the question of adverse possession. The adverse possession is evidenced by the manner of holding of the occupant and not by the opinions of the neighborhood": *Atwood v. Conrike*, 86 Mich. 105 (48 N. W. 950).

The decree of the court below will therefore be reversed, and one entered here as prayed for in the complaint.

REVERSED.

Argued 22 October, decided 17 December, 1907.

SUTHERLIN v. BLOOMER.

93 Pac. 185.

APPEAL—EXCEPTIONS—TRIAL DE NOVO.

1. Under the express terms of Sections 406 and 555, B. & C. Comp., on appeal, suits in equity are triable *de novo* on the transcript and evidence accompanying the appeal, and accordingly exceptions to the rulings on such suits are unnecessary, except in the instance provided for by section 406, where the court may refuse to permit testimony offered to be taken over its rulings sustaining objections thereto, in which event an exception to such refusal appearing in the record is sufficient to show no waiver of the right claimed is intended. Hence in equity appeals a bill of exceptions is unnecessary, and one cannot be considered, and, when accompanying the transcript, must be treated as surplusage, except in so far as the testimony there certified may be applied in determining the issues involved.

EVIDENCE—OBJECTIONS TO TESTIMONY IN EQUITY SUITS.

2. In equity suits, in order that objections to admission of testimony may be of any avail on appeal, they must be taken and noted in the trial court.

SAME.

3. Where, at the trial, testimony is tendered, but objections thereto are sustained, the party offering the testimony may have it taken and recorded over the court's rulings, by offering to pay the additional expense incurred thereby in the event the proffered testimony shall finally be held inadmissible.

SAME.

4. Where testimony is proffered, objections thereto sustained, and notwithstanding a request that it be taken and recorded, as provided in Section 406, B. & C. Comp., the court refuses to permit the testimony to be taken, and it shall on appeal appear that the rejected testimony is essential to a proper determination of the issues, the case may be remanded with directions to admit the desired testimony.

SAME.

5. When objections are sustained to testimony offered, but recorded regardless of such ruling, and relying upon the correctness of the ruling of the court, no proof is offered in response to such testimony, and on appeal it shall be determined that the court erred in sustaining the objections thereto, the cause may be remanded for further proceedings, if deemed essential to a proper determination of the rights of the parties.

REVIEW—QUESTIONS PRESENTED.

6. Where defendant in an equity suit manifested no desire to have testimony reported over the trial court's rulings, as might have been done under the express terms of Section 406, B. & C. Comp., questions as to the admissibility of the excluded testimony are not presented on appeal, except in so far as necessary to a review of other errors assigned.

ACCORD AND SATISFACTION—SETTLEMENT OF CAUSES—CONSIDERATION.

7. Any action, suit, or proceeding may be settled by accord and satisfaction thereof by a separate agreement, if made for a valuable consideration.

SAME—INTENTION.

8. Whether an agreement for the settlement of a suit or the performance thereof shall constitute a satisfaction, depends upon the intention of the parties thereto; the rule applying to oral contracts, if executed, as well as written ones.

EVIDENCE—PAROL—ADMISSIBILITY TO AFFECT WRITING.

9. Parol testimony is inadmissible to contradict, add to, detract from, or vary a written contract which is clear and explicit, and contains no latent ambiguities.

SAME—CONSIDERATION.

10. Where the statement in a written agreement as to the consideration consists of a specific promise to perform certain acts, it cannot be modified by parol evidence; and so, where a written agreement recited the release of attachments as a consideration, but states no basis for an inference that the actions were to be dismissed, parol testimony is inadmissible to show the latter fact.

PLEADING—ANSWER—INSUFFICIENCY—FAILURE TO DEMUR.

11. The insufficiency of an answer may be urged in opposition to defendant's motion for judgment on the pleading in the lower court, or on appeal, though no demurrer was filed thereto.

SAME—PLEA IN ABATEMENT—CONSTRUCTION.

12. Since pleas in abatement do not question the merits, but merely tend to delay the remedy, they are not favored, and much strictness is applied to them, and they will not be aided in construction by any intendments. With them correctness of form is a matter of substance, and any defect of form is fatal.

SAME—PLEA IN BAR.

13. Where matter concludes in bar, it must be so treated, and its character must be determined not from the subject-matter of the plea, but from its conclusions or prayer.

SAME—WAIVER OF PLEA.

14. By not pleading a contract in abatement, defendant waived any right to rely upon it for that purpose, and may not insist that under the contract the decree against him was premature.

APPEAL—REVIEW—HARMLESS ERROR—FINDINGS.

15. Under section 406, B. & C. Comp., requiring findings on all material issues in equity cases, and providing that on appeal the cause shall be tried anew without reference to such findings, failure to make findings is not reversible error, where the transcript discloses all the proceedings had and evidence taken below, and especially where the complaining party does not appear to have been prejudiced.

FINDINGS—PRACTICE.

16. It is not contemplated by the statute that findings of fact and conclusions of law shall be made by the trial court where judgment is had on the pleadings, or for want of an answer.

From Douglas: JAMES W. HAMILTON, Judge.

Suit to foreclose a chattel mortgage. From a decree for plaintiff, defendant appeals.

Statement by MR. COMMISSIONER KING.

This is a suit to foreclose a chattel mortgage on furniture and other property owned by, and in the possession of, the defendant, as mortgagor; the chattels involved being in what is

known as the "McClallen House," in Roseburg, Or., which was at the time the proceedings were begun being conducted by him as a hotel under an unexpired lease thereon. The complaint is in the usual form, and demands judgment for \$5,000, with interest, costs and disbursements, including \$250 attorney fees, together with a decree of foreclosure to satisfy the sums demanded. Three months after service of summons defendant answered, admitting that on the date of the filing of the suit he was indebted to plaintiff in the sum mentioned in the complaint, except as to attorney fees, concerning which he denies that \$250, or any other sum, is reasonable to be adjudged by the court for the prosecution of the suit. For a further, separate and affirmative answer he alleges:

"That on the 19th day of August, 1905, the said plaintiff and the defendant herein, and one Chan Hi, the Douglas County Bank, and the H. Marks Company mutually entered into an agreement in full accord and satisfaction of the said indebtedness set forth in plaintiff's complaint, which agreement was in writing and was in words and figures as follows, to-wit:

'This indenture, made and entered into this 19th day of August, A. D. 1905, by and between Thos. C. Bloomer, of Roseburg, Douglas County, Oregon, the party of the first part, and J. R. Sutherlin, Chan Hi, the H. Marks Co., a corporation, and the Douglas County Bank, a corporation, the parties of the second part, witnesseth, that whereas, each of said parties of the second part is a creditor of the party of the first part; and

Whereas, on the 16th day of August, 1905, the three last named of the parties of the second part filed in the Circuit Court of the State of Oregon for Douglas County actions at law against said party of the first part and that writs of attachment have been issued therein in favor of the H. Marks Co. and the Douglas County Bank, and all the property of the party of the first part has been levied upon under said writs of attachment;

Now therefore, in consideration of the release of said writs of attachment aforesaid by the Douglas County Bank and by H. Marks Co., the said Thos. C. Bloomer has sold, assigned, set over and delivered to all of the said parties of the second part in trust for each of said parties jointly and severally, that

certain lease of the McClallen House property which said lease of said property was executed by Electa McClallen, on the 9th day of May, 1901, in favor of M. Schmidt, and by said M. Schmidt on the 18th day of November, 1903, assigned to J. R. Sutherlin, and thereafter, and on the 31st day of March, 1904, assigned by said J. R. Sutherlin to Thos. C. Bloomer, the first party named herein.

Now the conditions of this sale and assignments are such that: Whereas, there is due to the said J. R. Sutherlin, one of the parties of the second part, named herein, on a certain note given by the party of the first part to said J. R. Sutherlin on the 31st day of March, 1904, for the sum of \$5,000, bearing interest at the rate of 8 per cent per annum, an unpaid balance of ——— dollars; and

Whereas, there is due to Chan Hi, one of the parties of the second part named herein, from the party of the first part the sum of \$1,355; and

Whereas, there is due from the party of the first part to the H. Marks Co. the sum of \$781.83, bearing interest at the rate of 8 per cent per annum from August 15, 1905; and

Whereas, there is due from the party of the first part to the Douglas County Bank, one of the parties of the second part herein, an unpaid balance of a promissory note of \$300, bearing interest at 6 per cent per annum after July 31, 1905;

Now therefore, should the party of the first part continue in the conduct and management of the said McClallen House property and conduct the same as a first-class hotel, and after defraying all current expenses necessary in the conduct of said business, and of the net proceeds of said business pay into the Douglas County Bank for the *pro rata* use and benefit of the said second parties, according to the amount of their respective claims, until each and all of such claims are fully paid, satisfied and discharged, together with all costs heretofore incurred and which may hereafter accrue by reason of such claims, then this sale and assignment shall be null and void, otherwise to remain in full force and effect.

It is hereby fully agreed and understood and made a part of this contract and one of the conditions to its faithful performance, that Bert Westbrook, the present clerk of the said McClallen House, is to remain in his present position as agent of the parties of the second part; that he, the said Bert Westbrook, is to keep the books of the said McClallen business, under the terms of this contract, and to see that the payments herein con-

ditioned are fully and fairly made; that any violation of this last condition will work a forfeiture of this entire contract.

Given under our hands and seals this 19th day of August, 1905.

Signed, sealed
and delivered in
the presence of
W. W. Cardwell.

Thos. C. Bloomer. [Seal.]
J. R. Sutherlin. [Seal.]
Chan Hi. [Seal.]
H. Marks Co. [Seal.]
Douglas County Bank,

By J. H. Booth, Cashier. [Seal.]

That the said plaintiff accepted the said agreement and security in full satisfaction of said claims set out in said complaint, which said claims mentioned in said complaint are the same as set forth in said agreement. That said agreement is still in force and effect and defendant has not violated the terms thereof, and that plaintiff has accepted part payment under the terms thereof. That all moneys due under said agreement have been paid in accordance with the terms thereof, and that there is nothing now due under said contract. Wherefore defendant prays judgment and decree herein dismissing plaintiff's complaint and for such other and further relief as may be meet and equitable, and defendant will ever pray."

Some time after the filing of the answer, and during a regular term of court, defendant moved for judgment on the pleadings, alleging failure on the part of plaintiff either to reply or demur to the answer. Afterwards, during the same term, but prior to the disposal of the motion, plaintiff filed a demurrer to the answer, which, together with defendant's motion, was overruled. Plaintiff then replied, admitting the execution of the contract as alleged, but denying that it was executed or accepted in satisfaction of the claim involved.

At the trial plaintiff introduced evidence relative to attorney fees, and rested. Defendant then offered testimony tending to prove that the contract set out was intended to be given in full satisfaction of the claim and mortgage mentioned in the complaint; that the written agreement given in his answer was accepted by plaintiff in full satisfaction thereof; and that, as an additional consideration to that stated in the written instrument

for its execution, plaintiff agreed to dismiss the foreclosure suit. Objection was made to this testimony as being an attempt to vary by parol the terms of a written instrument. Defendant, for the same purpose, also offered proof as to the value of the lease assigned to plaintiff and referred to in the contract, which offer was objected to as being incompetent, irrelevant and immaterial. Plaintiff's objections to all the testimony offered by the defendant were sustained, and the evidence offered was excluded by the court. A decree was entered for plaintiff, from which defendant appeals. The errors assigned and here urged are (1) the overruling of the motion for judgment on the pleadings; (2) the excluding of the testimony offered by defendant; (3) the failure of the court to make any findings upon which to base a decree.

AFFIRMED.

For appellant there was a brief and an oral argument by Mr. Albert Abraham.

For respondent there was a brief over the names of Mr. William W. Cardwell and Mr. James O. Watson, with oral arguments by Mr. William W. Cardwell.

Opinion by MR. COMMISSIONER KING.

1. This cause appears to have been tried, evidence offered, exceptions taken to the court's rulings thereon, and brought on a bill of exceptions as in actions at law. However, our statute clearly provides that suits in equity on appeal shall be tried *de novo* on the transcript and evidence accompanying it: B. & C. Comp. §§ 406, 555; *Robson v. Hamilton*, 41 Or. 246 (69 Pac. 651); *Powers v. Powers*, 46 Or. 481 (80 Pac. 1058).

2. It accordingly follows that exceptions to the rulings of the court in equity suits are unnecessary, save in the particular instance designated in B. & C. Comp. § 406, where the court may refuse to permit testimony offered to be taken over its rulings in sustaining objections thereto, in which event an exception to such refusal appearing in the record is sufficient to indicate that no waiver of the right claimed is intended.

3. A bill of exceptions in suits in equity, therefore, cannot be

considered on appeal, and, when accompanying the transcript, must be treated as surplusage, except in so far as the testimony there certified to may be applied in determining the issues involved.

4. The objections taken as to evidence offered, if urged on appeal, may be considered; and where testimony is tendered, but objections to the interrogatories are sustained, and the party offering the testimony demands that it be taken and recorded over the court's rulings, as provided in B. & C. Comp. § 406. but, notwithstanding such request, the court refuses to permit the proffered testimony to be taken, the cause may be remanded, with directions to admit the desired testimony, provided the testimony rejected shall appear admissible or necessary to a proper determination of the issues involved; but, in no event, is a bill of exceptions necessary in equity appeals.

5. Again, if the court sustains objections to interrogatories, but permits the witness to answer, and allows the response to be recorded over its rulings, and the opposite party, relying upon the correctness of the court's action, offers no proof in response to the testimony thus taken, and on appeal it shall be determined that the court erred in sustaining the objections thereto, the appellate court may, if deemed essential to a proper determination of the rights of the litigants, remand the cause for further proceedings: *Robson v. Hamilton*, 41 Or. 246 (69 Pac. 651).

6. The record in this cause discloses all the evidence introduced by plaintiff, together with the questions asked by counsel for defendant with objections made thereto. The answers were not taken over the rulings of the court, nor did defendant so request, but proceeded as in a law action. Had defendant demanded that the questions be answered, and offered to pay the additional expense incurred thereby, then, since the questions asked appear with the court's ruling thereon together with counsel's statement as to the purpose of the interrogatories, to which objections were sustained, he would be in position to urge the alleged erroneous rulings of the court in this respect as

grounds for remanding the cause for further proceedings; but, since he manifested no desire to have the testimony taken and reported over the rulings of the court, the question as to the admissibility of the excluded testimony is not properly before us for determination, except in so far as it may become necessary to a decision upon the first error assigned; and, since the transcript includes all proceedings except the points urged under the bill of exceptions, the points presented by the transcript of the judgment roll, including testimony taken, will be considered, so far as entitled thereto, under the record.

It is maintained that, inasmuch as the plaintiff was in default in pleading to the answer, the defendant's motion for judgment on the pleadings should have been sustained. This position appears to be based upon the theory that, notwithstanding the complaint alleges reasonable attorney fees, which is denied by the answer, the affirmative allegations in the answer are sufficient to preclude plaintiff's recovery of any portion of the claim named in the foreclosure suit, including attorney fees; and not having been denied by filing a reply, and no showing having been made as to the cause of the delay, a decree should be entered accordingly. The question as to whether it was within the power of the court to overrule the motion and allow plaintiff to file a reply or otherwise plead could be material here only in the event the answer states sufficient facts to entitle defendant to a dismissal of the foreclosure suit.

7. The question accordingly arises as to whether the affirmative allegations of the answer, which the failure to reply, for the purpose of the motion, admitted, state sufficient facts to entitle the defendant to a decree thereon. It appears well settled by the authorities that any action, suit or proceeding may be settled by accord and satisfaction thereof by a separate and distinct agreement, if entered into for a valuable consideration.

8. As to whether the agreement or the performance thereof shall constitute a satisfaction depends upon the intention of the parties thereto: 1 Cyc. 336.

9. And this is the rule with an oral contract, if executed, as

well as when reduced to writing, but it is equally as well settled that when a contract between the parties is reduced to writing and such writing is clear and explicit, containing no latent ambiguities, parol evidence is not admissible, either to contradict, add to, detract from or vary its terms: *Edgar v. Golden*, 36 Or. 448 (48 Pac. 1118, 60 Pac. 2); *Ruckman v. Imbler Lumber Co.* 42 Or. 231 (70 Pac. 811); *Hilgar v. Müller*, 42 Or. 552 (72 Pac. 319).

10. But it is argued that since the answer avers that there was a prior agreement whereby the contract set out in the answer should be accepted in full satisfaction of the claim specified in the suit, and that such agreement was a part of the consideration given to defendant by plaintiff, whereby defendant executed the instrument, and under which he permitted plaintiff to receive the lease to the hotel, and whereby he let plaintiff's agent, named in the writing, look after the collection of Sutherlin's *pro rata* of the moneys coming to him under its terms, that this is sufficient, if true, to entitle him to a dismissal of the suit. While these facts are alleged, it will be observed that the answer also avers that the agreement entered into between plaintiff and defendant, together with Chan Hi, the H. Marks Company and the Douglas County Bank, for the purpose of such accord and satisfaction, consisted of the written instrument quoted in the answer, thereby restricting the agreement relied upon to the one there specified. This clearly indicates that the contract, by which the satisfaction of the claims mentioned in the complaint was to be accomplished, is the written instrument referred to, and that it contains all the terms of an agreement between the parties, except the reference to the alleged additional consideration concerning the dismissal of the suit. It is true that this allegation is followed by one to the effect that plaintiff accepted the written contract and security referred to therein in full satisfaction of his claims; but when this statement is construed together with the averment relative to the dismissal of the suit, which it is urged was omitted from, and should have been included in, the contract, it can have reference only to the

covenants contained in the writings between them as set out in full in the answer, and a careful examination of this instrument fails to disclose any intention of dismissing the original suit. In fact, it is clearly stated therein that the consideration on the part of plaintiff and others signing with him consisted of the release of the writs of attachment mentioned, and nothing is there stated from which it could be inferred that any of the suits or actions should be dismissed. On the contrary, it is especially provided, not only that all costs theretofore incurred, but all costs which might thereafter accrue, by reason of the claims involved in the suit and actions pending, should be paid by defendant, thereby indicating, by inference at least, that the suit and actions there named should remain in *statu quo* until the claims were fully paid in the manner specified in the written contract, or at least until a reasonable time had elapsed, or until the contract should become forfeited through some failure to comply with its terms. From any point of view, therefore, we can find nothing in the contract from which it can be inferred that there was any intention of dismissing either this suit or the actions mentioned prior to a full payment of the claims in controversy. But it is argued that it is always permissible to show by parol, other and additional consideration than that specified in the contract, and that the averments are sufficient for that purpose; and this position is tenable where a monetary consideration is specified: *Burkhart v. Hart*, 36 Or. 586 (60 Pac. 205). But, in the case before us, the consideration specified in the written contract consists of certain acts to be performed, and the authorities are practically unanimous in holding that, where the statement in the written instrument as to the consideration is of a contractual nature, as where the consideration consists of a specific and direct promise by one of the parties to perform certain acts, it cannot be changed or modified by parol or extrinsic evidence. A party has a right to make the consideration of his agreement of the essence of the contract, and, when this is done, the consideration for the contract, with reference to its conclusiveness, must stand upon the same footing

as its other provisions, and accordingly cannot be affected by the introduction of parol or extrinsic evidence: 17 Cyc. 661; *Hilgar v. Miller*, 42 Or. 555 (72 Pac. 319); *Walter v. Dearing* (Tex. Civ. App.: 65 S. W. 380); *Cheesman v. Nicholl*, 18 Colo. App. 174 (70 Pac. 797); *Ind. Union R. Co. v. Houlihan*, 157 Ind. 494 (60 N. E. 943; 54 L. R. A. 787); *Tirce v. Yoeman*, 60 Kan. 742 (57 Pac. 955); *Sayre v. Burdick*, 47 Minn. 367 (50 N. W. 245).

11. The recital in the contract that it was entered into in consideration of the attachments being released, together with the manner of paying the indebtedness, etc., as there detailed, excludes the idea that any other agreements were to be performed, or of there being any other consideration. Then, conceding all the facts disclosed by the answer to be true, which the absence of a reply at the time of the motion admitted, it appears that defendant would not be entitled to a decree of dismissal. The same rule must prevail as to answers in this respect as in a complaint, from which it follows that it is immaterial that no demurrer was filed, for its insufficiency can be urged in opposition to the motion, whether in the court below or on appeal: B. & C. Comp. 72; *Moore v. Halliday*, 43 Or. 250 (72 Pac. 801; 99 Am. St. Rep. 724).

12. It is also maintained, in effect, that the contract discloses that the sums involved were to be paid out of the net proceeds of the business under the management there agreed upon, and that all payments due under these terms are alleged to have been paid, which is not denied, for which reason it is suggested that the decree is premature. The allegation that the payments due have been paid has reference only to the payment out of the net proceeds, so far as they have accumulated, and not that the claims specified therein have been fully paid. Plaintiff does not rely upon this instrument for recovery, but upon the original contract as contained in the mortgage. Hence it was unnecessary for him either to allege or prove a failure on the part of defendant to comply with the terms of the new agreement. The defense that the decree is premature could avail the de-

fendant only if pleaded in abatement; and, while the facts as alleged may have been sufficient to abate the suit, if pleaded for that purpose, they are pleaded in bar. This not only appears from the prayer of the answer, but it has been treated throughout the case by defendant as a plea in bar. Pleas in abatement, since they do not question the merits, but merely tend to delay the remedy, are not favored. Much strictness is accordingly applied to them, and they will not be aided in construction by any intendments. With them correctness of form is a matter of substance, and any defect of form is fatal: 1 Encyc. Pl. & Pr. 23.

13. Where matter in abatement concludes in bar, it must be so treated (*Morgan's Estate*, 46 Or. 242: 77 Pac. 608, 78 Pac. 1029), and its character must be determined, not from the subject-matter of the plea, but from its conclusion or prayer: 1 Encyc. Pl. & Pr. 27; *Lyman v. Cent. Vt. R. Co.* 59 Vt. 167 (10 Atl. 346); *Pitts Sons' Mfg. Co. v. Commercial Nat. Bank*, 121 Ill. 582 (13 N. E. 156); *Collette v. Weed*, 68 Wis. 428 (32 N. W. 753).

14. Defendant, not having pleaded the contract in abatement, necessarily waived any right to rely upon it for that purpose, and accordingly is not in a position to insist that the decree was prematurely entered: *Chamberlain v. Hibbard*, 26 Or. 428 (38 Pac. 437).

15. The next point to which our attention has been directed is that the court below made no findings of fact, and it is urged that this duty is made imperative by our code. B. & C. Comp. § 406, provides that the court, in rendering its decision in suits in equity, shall set out in writing its findings of fact on all material issues presented by the pleadings, together with its conclusions of law, each of which shall be stated separately from the decree and be filed with the clerk, thereafter constituting a part of the judgment roll of such cause; and that the findings of fact shall have the same force and effect as a verdict of a jury in actions at law. These provisions are followed by an exception and qualification thereof, to the effect that on

appeal the cause shall be tried anew without reference to such findings. Under this exception, it is clear that a failure to make findings should not constitute reversible error; nor can we conceive of any reason why it should have such effect when all the evidence offered and properly admitted is before the appellate court. It is true that where the evidence has been taken in the presence of the trial judge, and the court has prepared its own findings, they may be of material assistance to this court in reaching its conclusion on close questions of fact. But, since our statute expressly declares that this court shall try the cause anew without reference to the findings of the lower court, it is obvious that the absence thereof cannot be deemed fatal on appeal, even though the statute directs such findings to be made; for, while findings of fact and conclusions of law may, in some instances, be useful and convenient as a part of the records of the circuit court, it does not follow that they are essential here; and especially should the want of such findings not constitute reversible error, nor the cause be remanded on that account, when it does not appear that the complaining party is prejudiced by reason thereof.

16. It is not contemplated by the act that findings shall be made where no issues are tried, and it appears, as a result of the conclusions here reached, that the only material issue made and tried in this cause, under the pleadings in the court below, was in reference to the attorney fees claimed by plaintiff, as to which all the evidence bearing on that question is before us, while the conclusion of the circuit court thereon is contained in the decree. While the findings of fact in some instances might be material and of importance, the want thereof, when appealed, is not reversible error where the transcript discloses all the proceedings had and evidence taken in the court below.

There being no error disclosed by the record, the decree of the circuit court should be affirmed.

AFFIRMED.

Decided 7 January, 1908.

ST. BENEDICT'S ABBEY v. MARION COUNTY.

98 Pac. 231.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS.

1. The legislature may authorize a municipality to assess the expenses of street improvements on property benefited thereby, and such assessment is not a taking of property without due process of law, where the property owner is given an opportunity to be heard before the assessment is made.

MUNICIPAL CORPORATIONS—TAXATION—EQUALITY—STREET ASSESSMENTS.

2. A statute authorizing a municipality to assess the expenses of street improvements on property benefited thereby, does not violate the constitutional provision that taxation shall be equal and uniform.

STATUTES—"LOCAL STATUTE"—PROPERTY BENEFITED BY ROAD IMPROVEMENT.

3. Within Const. Art. IV, § 23, subd. 10, forbidding the enactment of special or local laws for the assessment and collection of taxes for State, county, township, or road purposes, Act February 22, 1905 (Laws 1905, p. 410), providing for the improvement of roads at the expense of the lands benefited thereby on petition of a majority of the resident landowners, etc., is general and applicable throughout the State, and is not a local statute applicable only to a particular locality or limited part of the State and the inhabitants of that part, though its operation is contingent, depending on the wish of the landowners in the vicinity of a proposed improvement and the existence of certain conditions.

HIGHWAYS—ROAD IMPROVEMENTS—ASSESSMENTS—BENEFITS.

4. The expenses of road improvements can be assessed against lands benefited only in proportion to benefits, and an act authorizing the assessment of a portion of the expense without reference to benefits is invalid. Act February 22, 1905 (Laws 1905, p. 410), providing for the improvement of roads, the expenses of which are to be assessed on real estate adjacent thereto and benefited thereby, according to the benefits, etc., limits the assessment to lands benefited by the improvement, and in proportion to such benefits and is valid.

SAME—BENEFIT DISTRICTS—POWER OF LOCAL BOARD OF VIEWERS.

5. The legislature, in providing for the payment of road improvements by assessment on property benefited, may fix the sum to be raised, and prescribe the benefit district, or it may delegate one or both of the questions to a local board of viewers, and has a wide discretion in providing for road improvements at the cost of property benefited, and prescribing the taxing district, and delegating to local boards of viewers power to determine the extent of the benefits and the manner of apportioning the expense, and its action will not be disturbed, unless it clearly appears that it has exceeded its constitutional authority, its taxing power being unlimited except as restricted by the federal constitution.

SAME—"ROAD"—OVERLAPPING LANDS.

6. The word "road" in Act February 22, 1905 (Laws 1905, p. 411), § 7, providing that where any "road" has been constructed under the act providing for the improvement of roads at the expense of the property benefited thereby, and another "road" shall be thereafter constructed within four miles thereof, the amount to be assessed against all lands included within the overlapping two-mile lines of each road shall be equitably determined by the county court, on

the report of the viewers and appraisers, means the portion improved, and the improvement of any other portion of the same road is another road, and lands within the overlap are protected from unequal burdens.

SAME—APPEAL—RIGHT TO QUESTION ACTION OF VIEWERS.

7. Since Act February 22, 1905 (Laws 1905, p. 410), providing for the improvement of roads at the cost of lands benefited thereby, gives a landowner within the taxing district opportunity to question the action of viewers as to whether his land is benefited, or as to how much it may be benefited, and as to whether the assessment on his land is proportionate to the benefits, and gives him a right to appeal to the circuit court, equity will not interfere, unless the method adopted in estimating the benefits and assessing the expenses amounts to a fraud on him, the remedy provided by the statute being otherwise exclusive.

From Marion: WILLIAM GALLOWAY, Judge.

Statement by MR. JUSTICE EAKIN.

This is a suit in equity to enjoin the improvement of a county road and to prevent the assessment of any portion of the expense thereof upon plaintiff's lands. A demurrer to the complaint was overruled by the lower court, and decree rendered granting a perpetual injunction against defendant, and it appeals. Based upon the petition of landowners along the line of what is known as the "Silverton-Marquam Road" asking for the improvement of a portion of said road, the county court of Marion County, on about March 9, 1906, commenced proceedings to improve said road, under the provisions of an act of the legislative assembly of the State of Oregon, of date February 22, 1905 (Laws 1905, p. 410), providing for the improvement of roads at the expense of the lands benefited thereby. Viewers were appointed under the provisions of the said act, who proceeded to and did estimate the cost of said improvement to be \$23,746.10, and also estimated the value of benefits to all lands within the two-mile limit to be \$17,492.20, and in their report to the court itemized such benefits and the apportionment of such expenses by setting opposite the name of each person the description of his land subject thereto, the classification thereof, according to benefits thereby to be derived, the number of acres in each classification, and the estimated benefits and apportionment of expenses thereto. In estimating the benefits, they classified the land as to its relative location to the road and as to its quality, and attempted to make such apportionment of expense according to

benefits, which resulted in the assessment of \$479 against the lands of plaintiff; and on July 25, 1907, the county court, after disallowing the remonstrances that had been filed to the action of the viewers, approved their report, and ordered the improvement made, the enforcement of which decree of the county court is the proceedings sought to be enjoined. REVERSED.

For appellant there was a brief over the names of *John H. and Charles L. McNary*, with an oral argument by *Mr. Charles L. McNary*.

For respondent there was a brief over the names of *Carson & Cannon*, with an oral argument by *Mr. Anderson M. Cannon*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. The road act in question authorizes county courts to improve any county road by grading, graveling, macadamizing, etc., the same; and to appoint viewers to estimate the cost and expense of the proposed improvement and the benefits to the land within the taxing district; and that the costs and expenses thereof be paid by assessment on the real estate adjacent thereto and benefited thereby, within two miles on either side and one mile beyond the terminus of such improvement, in proportion to the benefits to be derived therefrom; and to apportion the estimated costs and expenses of the improvement upon said lands according to the benefits derived therefrom, including the lots in any incorporated city or town.

It is also provided by Section 6 that the owner of any lands affected by the work proposed may remonstrate against the report of the viewers for the following causes:

“(1) That the report of the viewers is not according to law; (2) that the lands of the party filing the remonstrance are not benefited, or are assessed too much as compared with other lands assessed as benefited, specifying such lands; (3) that the lands of the party filing the remonstrance are damaged, or that the damages assessed are inadequate; (4) that it is not practical to accomplish the proposed work without an expense exceeding the aggregate benefits; (5) that the proposed work will not be of public utility or convenience.”

Also Section 6 further provides that the issues raised by such remonstrance shall be tried by the county court, and, if it finds for the remonstrants upon the fourth or fifth cause thereof, the proceeding shall be dismissed at the cost of petitioners, and if resident owners of lands affected by such proposed improvements, upon which more than two-thirds of the aggregate assessment for benefits has been made, shall remonstrate against said petition for the fifth cause of remonstrance, the said petition shall be dismissed, and if the court finds for the remonstrants for the first, second or third cause, it shall modify the report accordingly. By Section 14 appeal to the circuit court may be taken by remonstrants from the decision of the county court upon any of the first three causes of remonstrance, and the issues therein tried by a jury. That the legislature may authorize a municipality to assess the expense of the improvement of streets upon the property benefited thereby, and that such assessment is not a taking of property without due process of law, if the property owner has had an opportunity to be heard before the assessment is made, has been frequently held by this court.

2. Nor is such an act a violation of the constitutional provision that taxation shall be equal and uniform: *King v. City of Portland*, 2 Or. 146; *Masters v. City of Portland*, 24 Or. 161 (33 Pac. 540); *Wilson v. City of Salem*, 24 Or. 504 (34 Pac. 9, 691); *Elliott, Roads & Streets* (2 ed.). § 543; *Cooley, Taxation* (2 ed.), pp. 634-636.

3. This principle is recognized in many other Oregon cases, but as applied to rural highways, it is contended that the act violates the provision of subdivision 10 of Section 23 of Article IV of the constitution, which provides that the legislature shall not pass special or local laws "for the assessment and collection of taxes for state, county, township or road purposes." It cannot be seriously contended that this law is local. It is, by its terms, general and applicable throughout the state, and may be invoked for any road, for the improvement of which a majority of the resident landowners of the county, whose lands are within the taxing district, may petition. A local statute is one

which applies only to a particular locality or limited part of the state, and the inhabitants of that part. An act relating to a particular road in Tillamook County was held to be void in *Maxwell v. Tillamook County*, 20 Or. 495 (26 Pac. 803), because it was applicable only to the one road and was clearly local. In *Ellis v. Frazier*, 38 Or. 462 (63 Pac. 642: 53 L. R. A. 454), the bicycle tax law was held to be local and special, for the reason that it applied only to a few counties. But a law is not local or special that is applicable throughout the state, even though its operation in any locality is made to depend upon a local contingency, or a particular expediency to be ascertained or determined by a public vote in the locality or by petition, or adjudication of a court or other authority authorized by the act. It is, nevertheless, open to every locality when brought within its terms. This is the holding in *Fouts v. Hood River*, 46 Or. 492 (81 Pac. 370: 1 L. R. A., N. S., 483); *Baxter v. State*, 49 Or. 353 (88 Pac. 677); *Goodrich v. Winchester & Deerfield Turnpike Co.* 26 Ind. 119; *Palmer v. Stumph*, 29 Ind. 329; and *Paul v. Gloucester County*, 50 N. J. Law, 585 (15 Atl. 272: 1 L. R. A. 86). The Indiana "act concerning gravel and macadamized roads" (Laws of 1903, p. 255, c. 145) is almost identical with the one under consideration, and the constitution of that state prohibits local laws for the assessment and collection of taxes for road purposes. There it was held that an earlier law of like import is general in its provisions and open to all the citizens of the state to avail themselves of its benefits: *Goodrich v. Winchester & Deerfield Turnpike Co.* 26 Ind. 119; *Bowlin v. Cochran et al.* 161 Ind. 486 (69 N. E. 153). Statutes in other states authorizing special assessments upon the property benefited for the expense of the improvement of rural highways or drainage districts are upheld: 25 Am. & Eng. Ency. Law (2 ed.), 1183; *Lewis et al. v. Laylin et al.* 46 Ohio St. 663 (23 N. E. 288); *Williams v. Cammack*, 27 Miss. 209 (61 Am. Dec. 508); *Graham, etc., v. Conger, etc.* 85 Ky. 582 (4 S. W. 327); *Malchus v. District of Highlands*, 4 Bush (Ky.), 547. The operation of this statute is contingent, depending upon the wish of a majority of

the landowners in the vicinity of any proposed improvement and upon the existence of certain conditions, but it is applicable in every portion of the state alike when the contingencies are met.

4. It is also contended that the act authorizes the assessment of a portion of the expense of the improvement against plaintiff's property without reference to benefits. It is certain that the expense of such improvements can be assessed only against lands benefited, and it must be apportioned according to such benefits: *O. & C. R. Co. v. Portland*, 25 Or. 229 (35 Pac. 452; 22 L. R. A. 713); *King v. Portland*, 38 Or. 402 (63 Pac. 2: 55 L. R. A. 812); Elliott, *Roads & Streets* (2 ed.). 542. But this statute is not subject to the criticism that it authorizes such assessment in excess of benefits. The act relates to improvements, the expenses for which are to be assessed "upon real estate adjacent thereto and benefited thereby." This is expressed in Section 2 of the act, as well as in the title. In Section 2 the viewers are directed to "make an estimate of the value of the benefits to all lands within two miles of such improvements, and if the said viewers and appraisers find that such improvement will be of public utility and convenience, and that the costs or expenses thereof, including damages caused landowners thereby, will be less than the benefit to the lands within two miles on either side and one mile beyond the terminus of such improvement, they shall apportion the estimated costs, expenses and damages upon all the said lands within two miles on either side, and one mile beyond the terminus, that are benefited, according to the benefits to be derived therefrom." Thus the act clearly contemplates limiting the assessment to lands benefited and in proportion to such benefits.

5. It is also objected that the limits of the taxing district are fixed arbitrarily by the legislature, and do not include all lands benefited. It is within the power of the legislature to fix the sum to be raised, and also to prescribe the benefited district, or they may delegate one or both of these questions to a local board or body: *King v. Portland*, 38 Or. 402; *Spencer*

v. *Merchant*, 125 U. S. 345 (8 Sup. Ct. 921: 31 L. Ed. 763); *Spencer v. Merchant*, 100 N. Y. 585 (3 N. E. 682); *Bauman v. Ross*, 167 U. S. 548 (17 Sup. Ct. 966: 42 L. Ed. 270); *Williams v. Eggleston*, 170 U. S. 304 (18 Sup. Ct. 617: 42 L. Ed. 1047). The legislature has prescribed the taxing district and delegated to a local board of viewers power to determine the extent of the benefits and the manner of apportioning the expense, and it has a wide discretion in describing the taxing district, and its action will not be disturbed, except where it clearly appears that it has exceeded its constitutional authority. Its taxing power is unlimited, except as restricted by the federal constitution, and it may authorize local improvements to be made at the expense of the lands benefited. As said in *Spencer v. Merchant*, 100 N. Y. 585 (3 N. E. 682):

"The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so, and may settle both questions for itself; and when it does so its action is necessarily conclusive and beyond review."

This question is exhaustively treated by Mr. Justice WOLVERTON, in *King v. Portland*, 38 Or. 402 (63 Pac. 2: 55 L. R. A. 812), and he concludes:

"The authority of the legislature in these respects is almost without limit. Yet that there is a limit beyond which it cannot go all will concede. When, however, it has exercised its legislative discretion, and prescribed a district and adopted a method, it ought to be plain and indisputable that it has exceeded its constitutional authority before the court should undertake to set at naught its declared will."

There is nothing suggested in the case before us that indicates that the legislature has exceeded its authority in fixing the taxing district.

6. It is also urged that lands assessed for one improvement are unequally burdened in case of a further improvement overlapping the first taxing district. By Section 7 of the act (Laws 1905, p. 414) it is provided:

"And in all cases where any road has been constructed under this act, and another road shall be thereafter, under the provisions of this act, constructed within four miles thereof, the amount to be assessed against all lands included within the overlapping two-mile lines of each road shall be equitably determined by the county court, upon the report of said viewers and appraisers, to the end that such lands shall pay only a just and equitable proportion of the cost of constructing each road compared with other lands not within such overlap."

The term "road," as used here, undoubtedly means the portion improved, and the improvement of any other portion of the same road would be another road within the meaning of this act, and therefore lands within such overlap are protected from unequal burdens. If the portion of the viewers' report that is in the transcript correctly states the method of computing the assessment against the lands benefited, it would seem to be erroneous in so computing a certain proportion of the total expense against each class regardless of the acreage in such class; but it does not appear how plaintiff's lands are classified, or that they are injuriously affected, and such errors are not for correction in this court.

7. Ample opportunity is afforded a landowner within the taxing district to question the action of the viewers as to whether his land is benefited at all, or as to how much it may be benefited, and as to whether the assessment on his land is proportionate to its benefits, and he has a right to appeal to the circuit court from the action of the county court as to these questions, and that remedy is exclusive, unless it is obvious from the circumstances of the case that the plan or method adopted in estimating the benefits and assessing the expenses amounts to a fraud upon him. Equity will not review the action of the legislature in fixing the taxing district, or of the viewers in estimating the value of benefits to lands within the taxing district, or in apportioning the expense of the improvement, except where it is plain that the constitutional authority of the legislature has been exceeded. The one is the act of the legislature itself, and the other the exercise of a delegated power, and hence the power and discretion of the viewers are coextensive with that of the legisla-

ture while acting within the terms of the act, and, as said by Mr. Justice MOORE, in *O. & C. R. Co. v. Portland*, 25 Or. 229 (35 Pac. 452: 22 L. R. A. 713). "these are questions of policy with which the legislature and its creature, the municipal corporation, deals, and the courts have no right to interfere, except in case of fraud or oppression, or some wrong constituting a plain abuse of such discretion."

Therefore the court erred in overruling the demurrer to the complaint, and the decree will be reversed, and decree rendered here dismissing the suit.

REVERSED.

Decided 16 January, rehearing denied 24 March, 1908.

CUSITER v. CITY OF SILVERTON.

98 Pac. 234.

REVIEW—RETURN—CONCLUSIVENESS—JURY LIST.

1. The return on a writ of review to review judicial proceedings is conclusive as to the facts. The return on a writ of review to review proceedings of the recorder's court of a city on a trial for the violation of a municipal ordinance, showed that accused demanded a jury, and that, the court having no list of jurors in accordance with Section 2251 *et seq.*, B. & O. Comp., ordered an officer to select jurors, and that accused objected to that manner of selecting a jury, and filed a motion that a jury be selected from the jury list. Held to show that accused, at the time of his demand for a jury, had the right, as expressly authorized by Section 2257, B. & O. Comp., to demand a jury from the jury list, and the court could not direct an officer to select a jury.

JURY—SELECTION—JUSTICES' COURTS.

2. Where a party, as authorized by Section 2257, B. & O. Comp., demands a jury selected from the jury list, provided for by Section 2251 *et seq.*, the court cannot, over the objections of such party, direct an officer to summon a jury as authorized by sections 2221 and 2222, though the court has no jury list.

APPEAL—NEW TRIAL—EXCEEDING JURISDICTION—MISTRIAL.

3. Where the error of the court on a prosecution for the violation of a municipal ordinance resulted from exceeding its jurisdiction in directing an officer to summon a jury, notwithstanding the demand of accused for a jury from the jury list, the error amounted to a mistrial only, and the cause, after conviction, must be remanded for new trial.

From Marion: WILLIAM GALLOWAY, Judge.

Statement by MR. COMMISSIONER SLATER.

This action was brought to review the proceedings of the Recorder's Court of the City of Silverton, wherein the petitioner was charged with the violation of an ordinance to prevent the obstruction of streets and to prohibit throwing rub-

bish into streets, and imposing a fine for a violation thereof. It is averred in the petition that the complaint was made and filed on November 21, 1906; that on that date plaintiff was arrested and entered a plea of not guilty, whereupon the trial was set for December 10, 1906; that it was then continued until December 15, 1906, at the hour of 10 o'clock a. m., at which time plaintiff demanded a trial by jury and deposited the required jury fee, and also demanded that a jury be selected from the regular jury list, and be drawn from the jury box of said court; that the court denied plaintiff's demand for a selected jury, but issued an order to the city marshal to summon six citizens of the City of Silverton as jurors in said cause, which he did. Whereupon plaintiff filed written objections to the trial of the cause by the jury so drawn, and objected to each and every member of the jury for reasons particularly specified and set forth. Notwithstanding his objections, plaintiff was tried before the jury thus drawn, convicted of the charge, and sentenced by the court to pay a fine of \$10 and the costs of the action. Upon the return to the writ being filed, defendants herein filed a motion to dismiss the writ and affirm the proceedings of the trial court, but also asked that, in the event the court should be of the opinion that the recorder's court exceeded its jurisdiction in refusing plaintiff's request for a selected jury, the cause be remanded to the lower court, with directions to allow plaintiff's request. Upon the hearing the circuit court denied defendant's motion, sustained the petition, and set aside the judgment, but made no order remanding the cause for further proceedings. From this judgment, defendants appeal.

MODIFIED.

The case was submitted on briefs, under the proviso of Rule 16: 35 Or. 587, 600.

For appellant there was a brief over the name of *Mr. George G. Bingham*.

For respondent there was a brief over the names of *Mr. L. H. McMahan* and *Mr. J. E. Hammond*.

Opinion by MR. COMMISSIONER SLATER.

The invalidity of the judgment is based upon the charge that plaintiff was tried, over his objection, before a jury summoned by the officer of the court, instead of being drawn and selected from the regular jury list, as demanded by him. The charter of the City of Silverton provides, in substance, that the city recorder shall be *ex officio* police judge, and the judicial officer of the corporation, and shall hold court, which shall be known as "police court"; that he shall have jurisdiction of all crimes defined by ordinance, and the jurisdiction and authority of a justice of the peace, and he shall be subject to the general laws prescribing the duties of justices of the peace; that in all criminal cases before him, including all violation of city ordinances, he shall be governed by the general laws of the State governing justices of the peace in similar cases, but in the proceedings for violation of city ordinances the trial shall be without a jury, unless the defendant, on demanding a jury, shall deposit a sum sufficient to pay the per diem for the jury for one day. The general laws governing trials and proceedings in criminal actions in justices' courts provide that upon a plea other than a plea of guilty, if the defendant does not then demand a trial by jury, the justice must proceed to try the issue (Section 2270, B. & C. Comp.). and, if a trial by jury be demanded, a jury must be selected and summoned as in a civil action in a justice's court (Section 2271, B. & C. Comp.).

In Chapter 5, Title XX, B. & C. Comp., relating to actions and proceedings in justices' courts in civil actions, it is found that each justice is required to have a jury list to be made by him on the first Monday in each year in the particular manner therein stated, from which juries are to be drawn for one year and until another list is selected; but, if for any reason the making of the jury list is omitted and neglected at the time designated, the same may be done on the first Monday of any month following, to serve until the close of the year and until another is made. The justice is also required to keep a jury box, in which is to be placed separate ballots containing the

name of each person on the jury list. When a right to a selected jury is established, it is to be drawn from this jury box; but Section 2257, B. & C. Comp., provides that

“* * When a jury is demanded in a justice’s court, instead of being selected by the officer as provided in Chapter 6 of this act, such jury must be drawn and selected from the jury list of the precinct if either party require it.”

That section is a part of the original justice’s act of 1864, and Chapter 6 thereof, referred to in this section, provides another and different mode of obtaining a jury by it being selected by an officer on the order of the court, as was done in the case now under review. That chapter, however, was repealed by act of February 17, 1899 (Laws 1899, p. 119); but those provisions relating to the summoning of a jury by an officer were re-enacted by the repealing act and now appear as Sections 2221-2222, in Chapter 3 of the Justice’s Code (B. & C. Comp. §§ 2221-2222).

1. It is contended by appellants that, to entitle a party to a selected jury, he must not only demand a jury, but, by the provisions of Section 2257, B. & C. Comp., must also at the same time demand that it be drawn and selected from the jury list of the precinct; and the respondent seems to concede that to be the law. Appellants also contend that the demand of defendant, in the action for a selected jury, was not in time, because it is claimed it was not made by him when he demanded a jury, but after the jury chosen and summoned by the officer had appeared. This claim is resisted by the plaintiff in the writ, who asserts that his demand for a selected jury was made at the time he demanded the jury. This issue must be determined by the return on the writ, which is conclusive. It contains a transcript of the orders of the court and minutes of the trial, which substantially confirm the averments of the petition. It appears therefrom that on December 15, 1906, at the hour of 7 p. m., the time set for the trial, defendant demanded a jury trial and deposited with the court the required amount as jury fee. Immediately succeeding the entry of this fact is the following:

"The court had no selected list of jurors in a jury box in accordance with Sections 2251, 2252, 2253, 2254, 2255 or 2256 of said code, or otherwise, or at all. Whereupon the court issued an order to the chief of police of the City of Silverton, directing him to select six men, or a greater number, if any of those already selected should be rejected."

Then follows a full copy of the order of the court, by the terms of which the jurors were to appear "at the hour of 7 p. m. of this day," which order was dated December 15, 1906. After this entry there is recorded the return of the officer, which is without date. Then follows this entry:

"The defendant objected and protested against the above manner of selecting a jury, and filed his motion that a jury be drawn from a selected list of jurors and from a jury box, as required by Sections 2251, 2252, 2253, 2254, 2255 or 2256 of the statutes of the State of Oregon."

After overruling of defendant's motion, it is stated in the record that defendant filed his written objections, which are of the same import and are set out in full.

The record shows conclusively both a demand for a jury and for one selected from a jury list; but, because the entry of the order to the officer and his return thereon intervene between the record of the defendant's demand for a jury and for a selected jury, the conclusion is sought to be drawn that such demands were made at different times, and the latter one after the jury summoned by the officer had appeared. But the order in which these entries have been made is not conclusive that the facts evidenced by them occurred in that order, unless it were so stated in the record. A justice's record is not made in the precise and formal way and with such accuracy as that of a court of record. There is nothing affirmatively stated in this record to indicate at what precise relative time of the proceedings of that session of the court the above objections and protests of defendant and his demand for a selected jury were in fact made with reference to the other noted or recorded events of that evening. But the subject-matter of the entry would indicate that his demand for a selected jury must have preceded in time the order of the court to its officer to bring in

a jury, and was coincident with his demand for a jury. If this is not the fact, why is it that the court thought it necessary to state in the record, as it did, that the reason for directing the officer to bring in a jury was that the court had no selected list of jurors in a jury box in accordance with certain sections of the code? Is the court not there arguing against the right of a selected jury? The sections of the code there enumerated, being the same sections enumerated by defendant in his demand for a selected jury and recorded later on, is also of some significance. The reason for this entry and its contents can be explained only upon the theory that a previous demand had been made by the defendant for a selected jury, as well as for a jury, but for want of a proper list, that part of defendant's demand could not, in the opinion of the court, be allowed, whereupon, it is recorded, he issued the order to the officer.

2. The fact that the trial court had no precinct jury list from which a jury may be drawn, is not a valid reason for denying a proper demand by a party to the action for a selected jury. The statute gives that right to a defendant when he makes a proper demand, and the neglect of the court to have a precinct jury list for the convenience of the court in summoning a jury by its officer cannot serve to take away that right. It seems to have been conceded by the court that the defendant in the action was at least entitled to trial by a jury; and, if he were entitled to a jury at all and made the proper demand for a selected jury, which we think the record shows, he was entitled to have it selected as the law provided, and he could not be legally compelled, over his objections, to go to trial before a jury selected by the officer. The trial court, therefore, exceeded its jurisdiction in that respect, and the circuit court committed no error in setting the judgment aside.

3. The error of the trial court, however, was to the extent only of exceeding its jurisdiction in a particular matter of its procedure in the course of the trial of a cause of which it had jurisdiction as to the subject-matter as well as of the person of the defendant therein, and amounts to a mistrial. For this reason the judgment appealed from should be modified, and the

cause remanded to the lower court, with instructions to remand to the trial court, with directions to set aside the judgment and take such other and further proceedings therein as may be proper. The petitioner should recover costs in this court.

MODIFIED.

Decided 16 January, rehearing denied 24 March, 1908.

BROWN v. CITY OF SILVERTON.

98 Pac. 287.

COSTS AND DISBURSEMENTS.

Under Section 506, B. & O. Comp., the allowance of costs and disbursements in the appellate court is entirely discretionary, and they will be awarded as different circumstances may seem proper.

From Marion: **WILLIAM GALLOWAY**, Judge.

Statement by **MR. COMMISSIONER SLATER**.

This action was brought to review the proceedings of the recorder's court of the City of Silverton, wherein the petitioner was charged, tried and convicted of the violation of an ordinance prohibiting the obstruction of streets. The petition and the material facts are the same as in *Cusiter v. City of Silverton*, and a like judgment was entered by the circuit court, from which the defendant appeals.

MODIFIED.

The case was submitted on briefs, under Rule 16: 35 Or. 587, 600.

For appellant there was a brief over the name of *Mr. George G. Bingham*.

For respondent there was a brief over the names of *Mr. L. H. McMahan* and *Mr. J. E. Hammond*.

Opinion by **MR. COMMISSIONER SLATER**.

The material facts being identical with the case of *Cusiter v. City of Silverton*, 50 Or. 419 (93 Pac. 234), that case is controlling. Therefore the judgment appealed from should be modified, and the cause remanded to the lower court, with instructions to remand to the trial court, with directions to set aside the judgment and take such further proceedings therein as may be proper, not inconsistent with this opinion. The petitioner should recover costs in this court.

MODIFIED.

Argued 10 October, decided 17 December, 1947.

STATE v. KLINE.

98 Pac. 237.

CRIMINAL LAW—CHANGE OF VENUE—AFFIDAVITS—NECESSITY—STATUTORY PROVISIONS.

1. Under Section 1250, B. & O. Comp., providing that in an action for a felony, where the cause is at issue upon a question of fact, the court may order the place of trial to be changed, when it appears by affidavit, to the satisfaction of the court, that a fair and impartial trial cannot be had in the county, etc., a motion for a change of venue in an action for a felony, when a transfer of the cause is objected to, raises an issue which must be determined by the court from an inspection of affidavits.

SAME—APPEAL—RECORD—BILL OF EXCEPTIONS—CONTENTS.

2. Affidavits for a change of venue must be incorporated in a bill of exceptions and transmitted to the Supreme Court, in order to have the action of the trial court reviewed on appeal, if such action is assigned as error, and where such affidavits are merely certified by the clerk, it does not make them a part of the bill of exceptions, and alleged error in refusing to grant a change cannot be considered.

SEPARATE TRIAL OF DEFENDANTS—MISDEMEANOR—REVIEW OF COURT'S DISCRETION.

3. Under Section 1395, B. & O. Comp., providing that when two or more defendants are jointly indicted for a felony, any defendant requesting it must be tried separately, but that in other cases defendants jointly indicted may be tried separately or jointly, in the discretion of the court, refusal on appeal from justice's court to grant separate trials to persons charged with a misdemeanor, will not be held error, when the bill of exceptions does not show that the court abused its discretion.

STATUTES—VETO POWER—ABSENCE OF CONSTITUTIONAL PROVISIONS.

4. In a democratic form of government, the authority of an executive to veto an enactment of the legislative department, is not an inherent power, and can be exercised only when sanctioned by a constitutional provision.

SAME—ENACTMENT—APPROVAL—CONSTITUTIONAL PROVISIONS.

5. The amendment of Section 1, Article IV, of the Constitution of Oregon (B. & O. Comp. p. 72), reserves to the people the initiative, the right to propose laws and amendments to the Constitution, and to enact or reject them at the polls, and the referendum, the right to approve or reject at the polls any act of the legislative assembly, and provides that the referendum may be ordered by petition or the legislative assembly; also that the veto power of the Governor shall not extend to measures referred to the people. Const. Oregon, Art. V, § 15, provides that every bill which shall have passed the legislative assembly, shall be presented to the Governor for his approval before it becomes a law. *Held*, that a law proposed by petition and enacted by the people under the initiative, need not be approved by the Governor.

CRIMINAL LAW—EVIDENCE—"PRIMA FACIE EVIDENCE" DEFINED.

6. "Prima facie evidence" is that degree of proof which, unexplained or uncontradicted, is by itself sufficient to establish the truth of a legal principle asserted by a party.

INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—ADMISSIBILITY OF EVIDENCE.

7. Under the local option law (Laws 1905, p. 47, § 10), providing that the order of the county court declaring the result of a local option election shall be held

to be *prima facie* evidence that all the provisions of the law have been complied with in giving notice, etc., the order of the county court is admissible in a criminal prosecution for violating that law, without introducing the petition, notices, etc., but the burden is on the accused to overcome such *prima facie* proof.

CONSTITUTIONAL LAW—IMPAIRMENT OF VESTED RIGHTS—BURDEN OF PROOF—STATUTORY CRIMES.

8. The rule which imposes upon the defendant the burden of proof in a prosecution for a statutory crime does not violate any vested right which he possesses.

CRIMINAL LAW—APPEAL RECORD—BILL OF EXCEPTIONS—MATTERS NOT INCLUDED.

9. Documentary evidence which is not made a part of the bill of exceptions cannot be considered on appeal.

SAME—REVIEW—NECESSITY FOR PRESENTATION OF QUESTIONS IN TRIAL COURT.

10. The only questions brought up for review on appeal in a law action, are such as have been properly submitted to and considered by the trial court.

SAME—PRESUMPTIONS—NOTICE TO PRODUCE ORIGINAL DOCUMENT.

11. B. & C. Comp., § 708, subd. 1, provides that secondary evidence of the contents of a writing may be given when the original is in the possession of the party against whom it is offered, and he withholds it after receiving reasonable notice to produce it, as required by section 771. A bill of exceptions on appeal in a prosecution for violating the local option law, showed that an internal revenue license was issued to defendants, and was in their possession, but it was not made to appear that any notice to produce it had been given to them. The only objection to parol proof of the contents of the license was that it was incompetent, immaterial, irrelevant, and not the best evidence. *Held*, that as want of notice was not suggested, it must be presumed in favor of the judgment rendered, that testimony as to the demand to produce the license was duly given.

SAME—ADMISSION OF MANUSCRIPT—ABSENCE FROM RECORD.

12. Where a manuscript sent up with a package of papers on appeal is not made a part of the bill of exceptions nor properly identified, it must be presumed that no error was committed in admitting it in evidence.

SAME—MATTERS NOT OF RECORD—BILL OF EXCEPTIONS.

13. Where the bill of exceptions on an appeal from a conviction for violation of the local option law referred to a writing in the following terms: "Defendants offered in evidence articles of incorporation of the Corvallis Social & Athletic Club (marked 'Defendants' Exhibit D'), as follows: (Clerk print)"—and that was the only reference to the document, and the direction to print was not obeyed, though the articles of incorporation may have been included in a package of papers certified to by the clerk, it was not a part of the bill of exceptions, and when not identified by the trial judge, it cannot be considered on appeal.

INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—SALE—INCORPORATED CLUB.

14. Under the local option law (Laws 1905, p. 48, § 15), forbidding under penalty any person in prohibition territory to sell, exchange, or give away, with intent to evade the provisions of the law, any intoxicating liquors whatsoever, where intoxicating liquors are purchased by an incorporated society, and sold or distributed to the members at approximate cost, the act constituted a sale.

INFORMATION—WAIVER OF DEFECTS—DUPLICITY—FAILURE TO DEMUR.

15. Where a complaint charged defendants with selling "and" giving away intoxicating liquors with intent to evade the law, a failure to demur on the ground of duplicity in the specification of the charge, was a waiver of any defect on that account.

INTOXICATING LIQUORS—OFFENSES—SALES—STATUTORY PROVISIONS—EXCEPTIONS—SOCIAL CLUBS.

16. The local option law, section 2 (Laws 1905, p. 42), provides that the inhibition of the sale of intoxicating liquors, when effectuated, shall not prohibit the sale of certain liquors for certain excepted purposes, but no reference is made therein to clubs. *Held*, that when the prohibition law became operative in a certain county, it *ex proprio vigore* inhibited all social clubs within the county from selling or giving to members thereof, intoxicating liquors with a purpose of evading the law.

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—LOCAL OPTION LAW.

17. The local option law (Laws 1905, p. 41) is not unconstitutional as a delegation of legislative power, since the power to enact a law is not delegated, but authority was merely conferred upon the people of the counties to determine by a majority vote, whether a law already passed for the entire State shall be applicable to such county, since it is the majority vote of the electors, and not the order of the county court, that effects the result, and the sale is forbidden by operation of the law.

INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—INSTRUCTIONS.

18. In a prosecution for violation of the local option law, where B., a witness, testified that at about the time stated in the complaint, he went into a building formerly operated as a saloon, and there talked with one of the defendants; that at the time he obtained a half pint of brandy, for which he offered to pay, but that the accused told him that an assessment would subsequently be made for the expense of the Corvallis Social and Athletic Club; that he thereafter paid an assessment of 40 cents; that he had not in the meantime procured any other goods at that place; that the sum paid was more than the ordinary price of such liquor, and that he thought the assessment imposed upon him included his right to visit the clubrooms—it was not error to instruct, that if the club was the owner of, or kept intoxicating liquor, which was sold or given to B. for the purpose of evading the local option law, and that defendants, or either of them, aided or authorized such sale or gift with such intent, the averments in the complaint were sufficiently established, for the use of the expression "sale or gift" was proper to dispel any doubt as to the nature of the disposal of the liquor under the circumstances mentioned.

SAME—EVIDENCE—INTERNAL REVENUE LICENSE—STATUTORY PROVISIONS—"PERSON."

19. The local option law, section 18 (Laws 1905, p. 50), provides that the issuing of a license or internal revenue special tax stamp by the Federal government to any person for the sale of intoxicating liquors shall be *prima facie* evidence that such person is selling, exchanging, or giving away intoxicating liquors. *Held*, that the term "person," as used, includes the word "corporation"; hence it was not error to instruct that if an internal revenue license had been issued to a certain club authorizing the sale of intoxicating liquor, such license was *prima facie* evidence that the club was engaged in selling, exchanging, or giving away intoxicating liquors, but that such finding alone would not be applicable to the defendants, or either of them.

From Benton: LAWRENCE T. HARRIS, Judge.

The defendant was convicted of violating the local option law, and from the judgment rendered thereon he appeals.

AFFIRMED.

For appellant there was a brief over the names of *Weatherford & Wyatt*, with an oral argument by *Mr. James R. Wyatt*.

For the State there was a brief over the names of *George M. Brown*, District Attorney, and *E. R. Bryson* and *W. S. McFadden*, with an oral argument by *Mr. Bryson*.

MR. JUSTICE MOORE delivered the opinion of the court.

The defendants, Charles M. Kline and Merwin McMaines, were jointly convicted in a justice's court of Benton County of the crime of selling and giving away intoxicating liquor with a purpose of evading the provisions of the local option law of Oregon, alleged to have been committed in that county. August 18, 1905, by then and there unlawfully selling and giving away, with such intent, intoxicating liquor to one Thomas Bell, at which time the sale of that kind of drink had been prohibited in the entire municipality, stating when and how the interdiction was effected, and further averring that the law was then and there in full force and effect. The defendants appealed from the sentences imposed upon them to the circuit court for that county, where the cause was tried anew, and McMaines acquitted; but Kline was convicted, and, from the judgment which followed, he appeals to this court.

1. It is contended by his counsel that an error was committed in refusing to grant a change of venue. To secure a transfer of the cause to another county for trial, the defendant interposed a motion which states that it was based on affidavits filed therewith. A number of affidavits, newspaper clippings and other papers were fastened together and sent up to this court, but they are not made a part of the bill of exceptions or identified in any manner by the trial judge. A motion to secure a change of venue in an action for a felony, when a transfer of the cause is objected to, raises an issue which must be determined by the court from an inspection of affidavits: B. & C. Comp. § 1250.

2. These written declarations under oath constitute the proof, which, like all other evidence, must be incorporated in a bill of exceptions and transmitted to this court, in order that the action of the trial court may be reviewed on appeal, if assigned as error. The affidavits referred to, though certified by the clerk, do not make them a part of the bill of exceptions, and hence the question suggested, even if the crime charged were a felony, is not before us for consideration: *State v. Clements*, 15 Or. 237 (14 Pac. 410); *Roberts v. Parrish*, 17 Or. 583 (22 Pac. 136); *Craft v. Dalles City*, 21 Or. 53 (27 Pac. 163); *Fisher v. Kelly*, 26 Or. 249 (38 Pac. 67); *Farrell v. Oregon Gold Co.* 31 Or. 463 (49 Pac. 876); *Nosler v. Coos Bay Navigation Co.* 40 Or. 305 (63 Pac. 1050, 64 Pac. 855); *Multnomah County v. Willamette Towing Co.* 49 Or. 204 (89 Pac. 389).

3. It is also maintained that the court erred in denying the defendants' motion to grant separate trials. When two or more persons are jointly charged with the commission of a felony, any defendant requiring it must be tried separately, but in all other cases the granting of a separate trial is a matter of discretion: B. & C. Comp. § 1395. The crime charged in the case at bar is only a misdemeanor, and as the bill of exceptions does not show that the discretion reposed in the trial court was abused, its action in refusing to grant separate trials was not erroneous.

4. It is insisted that the local option liquor law, the provisions of which Kline is charged with having violated, was initiated by a petition and ratified by a vote of the electors of Oregon, but the enactment was not submitted to the Governor for his approval or rejection, and for that reason it never became operative. The amendment of Section 1 of Article IV of the constitution of Oregon (B. & C. Comp. p. 72) contains the following clause: "The veto power of the Governor shall not extend to measures referred to the people." As this amendment provides that the referendum may be ordered either by petition of the electors or by the legislative assembly, it might seem reasonably to be inferred from the limitation of the Governor's authority, that he could annul any measure initiated by

petition. In a democratic form of government, the authority of an executive to set aside an enactment of the legislative department is not an inherent power, and can be exercised only when sanctioned by a constitutional provision. The fundamental laws of Delaware, North Carolina, Ohio and Rhode Island do not confer the veto power on the Governors of those states.

5. In this State, prior to the amendment referred to of the constitution, every bill which passed the legislative assembly was required to be presented to the Governor before it became a law: Const. Or. Article V, Section 15. This provision of the organic act was impliedly changed by the amendment under consideration, so as practically to insert in the original the following parenthetic clause, to-wit:

"Every bill which shall have passed the legislative assembly (except such as may, by order of that body, be referred to the people for their sanction or rejection) shall, before it becomes a law, be presented to the Governor," etc.

The amendment of Section 1 of Article IV of our constitution does not direct that a proposed law, when enacted by the people, pursuant to an exercise of the initiative power reserved, shall, before it becomes operative, be presented to the Governor; and hence the chief executive of this State is powerless either to approve or repudiate a measure passed in the manner indicated. The local option law of Oregon was proposed by initiative petitions, and approved by a majority vote of the electors, June 6, 1904, and took effect 18 days thereafter, conformable to the Governor's proclamation and without his approval.

6. It is urged that an error was committed in admitting the evidence, over objection and exception, a certified copy of the order of the County Court of Benton County, declaring the result of the election, held under the local option law, and absolutely prohibiting the sale of intoxicating liquors within that municipality, without first having introduced in evidence, as a foundation for such prescription, the petition initiating the right to call the election, the notices issued in pursuance of such call and the proof of posting the notices. A clause of the local

option law relating to the action of a county court in declaring the result of an election, held to determine whether or not the sale of intoxicating liquor should be prohibited, is as follows:

"The order thus made shall be held to be *prima facie* evidence that all the provisions of the law have been complied with in giving notice of and holding said election, and in counting and returning the votes and declaring the result thereof": Laws 1905, p. 47, § 10.

Prima facie evidence is that degree of proof which, unexplained or uncontradicted, is alone sufficient to establish the truth of a legal principle asserted by a party: 1 Jones Ev. § 7.

7. The provision of the law quoted casts upon a party to a criminal action, who is charged with violating the terms of the local option enactment, the burden of overthrowing such *prima facie* proof, by introducing in evidence the writings which constitute the alleged irregularity of the proceedings, upon which the order of prohibition is primarily based, without which statutory declaration of the character of proof, it would have been incumbent upon the State to establish the validity of the several initiatory steps necessary to the making of an efficacious order declaring the result of the election, and prohibiting the sale of intoxicating liquors in the territory specified: *Strode v. Washer*, 17 Or. 50 (16 Pac. 926); *Harris v. Harsch*, 29 Or. 562 (46 Pac. 141); *Brentano v. Brentano*, 41 Or. 15 (67 Pac. 922).

8. The rule which imposes upon a defendant the burden of proof in a prosecution for a statutory crime, does not violate any vested right which he possesses: 12 Cyc. 380. The order of the county court was admissible in evidence without introducing the petition, notices or proof of posting such notices: *State v. Carmody*, 50 Or. 1 (91 Pac. 446).

9. It is argued, however, that the *prima facie* proof mentioned was overcome by introducing in evidence the sheriff's certificate of the posting of the election notices. In the package of papers referred to upon the question of a change of venue, appears a memorandum, which has noted in the margin in lead pencil, "Defendant's Exhibit C." This exhibit purports to be the sheriff's return upon the notice mentioned, but it is not

made a part of the bill of exceptions or certified to in any manner by the trial judge, and for that reason it will not be considered.

10. It is contended that the court erred in admitting, over objection and exception, testimony tending to prove the contents of an internal revenue license, without calling for, or producing, the original or attempting to account for its absence. Secondary evidence of the contents of a writing may be given when the original is in the possession of the party against whom it is offered, and he withholds it (B. & C. Comp. § 703, subd. 1), after having received reasonable notice to produce it: Section 771, B. & C. Comp. The bill of exceptions shows that the license mentioned was issued by the collector of internal revenue, and having been displayed in the defendants' place of business, it was in their possession, but it does not appear that any notice to produce it had been given to them. The contents of the revenue stamp was attempted to be given by three witnesses, whose testimony was challenged by defendants' counsel on the ground that it was incompetent, immaterial and irrelevant, and not the best evidence. It will thus be seen that the objections interposed to such testimony do not negative the implication that the defendants had received reasonable notice to produce the license. The only questions brought up for review in a law action are such as have been properly submitted to, and considered by, the trial court; and, as the want of notice was not suggested, it must be presumed, in favor of the judgment rendered, that testimony in relation to the demand to produce the license was duly given.

11. R. Turney, as a witness for the State, testified that in August, 1905, as manager of the Corvallis Gazette, he printed in that newspaper office a letterhead, the manuscript for which; he believed, was prepared by the defendant McMaines; and, producing the writing, it was received in evidence as "State's Exhibit B," over an objection that it was incompetent, immaterial and irrelevant; that the witness had not shown himself competent to testify; and that the writing had not been identi-

fied as that of McMaines. This witness, on cross-examination, having testified that he did not remember having ever seen McMaines write, the testimony in relation to the manuscript was sought to be stricken out, for the reasons hereinbefore suggested, as to the declarations under oath of this witness, but the motion was denied and an exception saved.

12. In the package of papers adverted to appears what is marked "State's Exhibit B," but as the manuscript thus indicated is not made a part of the bill of exceptions, or properly identified, it must be presumed that no error was committed in admitting it.

13. The following excerpt is taken from the bill of exceptions, and contains the entire reference to the writing mentioned, to-wit: "Defendants offered in evidence articles of incorporation of the Corvallis Social & Athletic Club (marked 'Defendants' Exhibit D'), as follows: (Clerk print.)" This direction was not obeyed, and the articles of incorporation, though probably included in the package of papers mentioned, are not made a part of the bill of exceptions or identified by the trial judge; and, for the reasons hereinbefore given, the charter is not properly before us. Though the manner of conducting the business of the Corvallis Social & Athletic Club is not particularly disclosed by the testimony of any witness, we shall assume, without deciding the question, that the corporation was organized for a *bona fide* purpose, and not with intent to evade the provisions of the local option law, and that disposition of intoxicating liquors kept by it was made to the members of the organization; and, based on such supposition, we will consider whether a transfer of the possession of alcoholic drink by an agent of a corporation to a member thereof is lawful in territory where the local option law is in effect. Though the bill of exceptions, in the case at bar, is silent as to the manner in which the business of the Corvallis Social & Athletic Club was conducted by the defendant, who, at the time stated in the complaint, was an officer of the corporation, the mode pursued is so nearly uniform to that revealed in *Barden v. Montana Club*,

10 Mont. 330 (25 Pac. 1042: 11 L. R. A. 593: 24 Am. St. Rep. 27), that a description is taken from a note thereto, as follows:

"In nearly every state in the Union social clubs exist, some of which are incorporated, and others are not, and which are conducted for the use of the members only, to provide for their rational entertainment and amusement, both intellectual and social. They generally transact no business whatsoever for the purpose of making any profit, directly or indirectly, for themselves or their members, and the income derived from various sources is applied solely to defraying the expenses of the organization or incorporation. Their sources of income generally consist of an entrance or membership fee, collected from each new member, and such monthly dues as shall be assessed by the management or board of directors each month, together with money paid by members for what refreshments, liquors and cigars they obtain for their personal use, or that of their especially invited friends, at the clubhouse, and such additional assessments, fines and penalties as may be, from time to time, imposed upon the members. The money thus received is expended in paying the current expenses of the club, and the other enumerated sources of income are seldom sufficient to meet such expenses without the imposition of additional assessments. The spirituous and fermented liquors consumed by the members are bought by the club, and kept therein under charge of a steward or manager, an employee of the club, under the supervision and control of the board of directors. The members of the club, and no other persons, except especially invited guests, can get what liquors they want, by a member calling for them upon the steward and paying a price fixed by the regulation of the club, either at the time, or at the end of each month, or at such other time as such regulations may require. This price for the liquor is fixed and paid, not for the purpose of making any profit, either directly or indirectly, but merely for the purpose of covering the outlay in the purchase thereof by the corporation or organization. The moneys received are used to replenish the stock of liquors so kept for the use of the members, and the expense attendant upon the keeping and serving thereof at the clubhouse, and other expenses of the club."

14. When intoxicating liquors are purchased by an unincorporated social club, to be used in the manner indicated, it is generally conceded that the members of the organization are the joint owners of the general property in all the alcoholic

drinks thus kept; that the officer who, upon a request therefor, dispenses such liquor to members of the club, is their agent, and that the delivery of a quantity of such goods to a member, though for a consideration, whereby a special property is transferred, is not, in the strict sense of the term, a sale, because the element of a bargain is lacking. The people of this State, evidently having knowledge of the manner in which the business of social clubs was usually conducted, and also understanding that the disposal of intoxicating liquor to the members of such organizations might not be construed a sale, apparently intending to prevent such transfers of the special property in alcoholic drinks, as a beverage, adopted section 15 of the local option law, which so far as important herein, is as follows:

“When any such election has been held and has resulted in favor of prohibition, and the county court has made the order declaring the result, and the order of prohibition, any person who shall thereafter, within the prescribed bounds of prohibition, sell, exchange or give away, with a purpose of evading the provisions of this law, any intoxicating liquors whatsoever, or in any way violate the provisions of this law, shall be subject to prosecution,” etc.

It would thus seem, from an inspection of the language last quoted, that the section was framed with an intent to prevent the disposal of intoxicating liquors by an unincorporated social club to its members within prohibited territory, even if it were determined that the transfer of the special property in the liquor, by an agent of the organization to a member thereof, constituted only a gift. Where, however, as is assumed in the case at bar, intoxicating liquors are purchased by an incorporated society, to be used, as hereinbefore detailed, it would appear that the corporation is the owner of the liquors, and when they are dispensed to a member, with intent to pass the title in the goods, the act constitutes a sale.

15. It will be remembered that the complaint charges the defendants with selling and giving away intoxicating liquor with a purpose of evading the provisions of the local option law. No demurrer having been interposed by the defendants on the

ground of duplicity in the specification of the charge, any defect in the pleading on that account was thereby waived: *State v. Lee*, 33 Or. 506 (56 Pac. 415); *State v. Carlson*, 39 Or. 19 (62 Pac. 1116, 1119).

These preliminary matters having been disposed of, a consideration of the principal inquiry on this branch of the case will be resumed. In the note to the case of *Barden v. Montana Club*, 24 Am. St. Rep. 27, immediately following the excerpt hereinbefore quoted, the editors of that valuable series of case-law make the following observation, as deducible from an examination of adjudications applicable to the inquiry, to-wit:

"The question whether or not the furnishing of intoxicating or fermented liquor by a club to its members in the manner above stated constitutes a sale in violation of laws prohibiting sales, or whether or not it constitutes a sale within the meaning of a law requiring a license before one can engage in retailing such liquor, has been the subject of various and conflicting decisions by a number of the appellate courts of the country. While the cases cannot be reconciled, the current as well as the weight of authority is undoubtedly in favor of the rule that the distribution and consumption of liquors in a club by its members in the manner above stated is a sale, and a violation of laws of the nature stated."

Several cases are cited, and quotations therefrom are contained in the note that fully sustain the conclusion thus reached, and we adopt that part of such deduction as relates to the disposal of intoxicating liquor by a club to its members in violation of the provisions of a local option law, without further calling attention to the cases relied upon.

16. Section 2 of the local option law provides that the inhibition of the sale of intoxicating liquors, when effectuated, shall not prohibit the sale of pure alcohol for scientific and manufacturing purposes, or wines to church officials for sacramental purposes, nor alcoholic stimulants as medicine in case of actual sickness. The expression of these exceptions necessarily leaves no room for the consideration of any other exclusion; and hence, we conclude, that when the prohibition law became operative in Benton County, it, *ex proprio vigore*, inhibited all social

clubs within that territory from selling or giving to the members of such organizations intoxicating liquors with a purpose of evading the provisions of the enactment.

17. Exceptions having been taken to parts of the court's instructions, it is contended that errors were committed in giving them, to-wit: The court said to the jury, in effect: (1) That if they should find, beyond a reasonable doubt, that the county court of Benton County made an order, at a specified time, declaring the result of an election, and absolutely prohibiting the sale of intoxicating liquors within that territory, such declaration was *prima facie* evidence that all the provisions of the law, relating to giving notice, holding an election, counting and returning the votes cast and declaring the result thereof had been complied with; (2) that if they should find that the Corvallis Social & Athletic Club was the owner of or kept intoxicating liquor which was by some person, other than the defendants, sold or given to Thomas Bell, with a purpose of evading the provisions of the local option law, and that the defendants, or either of them, aided or authorized such sale or gift, with such intent, then the averments of the complaint were sufficiently established; (3) that if they should find that intoxicating liquor was owned by the Corvallis Social & Athletic Club, that such organization was duly incorporated, that the defendants were its agents and that Thomas Bell was a member of the club, then a sale or gift by them, as such agents, to him, with intent to evade the provisions of the local option law, would not exonerate them from liability; (4) that if they should find that an internal revenue license had been issued to the Corvallis Social & Athletic Club, authorizing the sale of intoxicating liquor, such permission afforded *prima facie* evidence that the club was, during the time specified in the tax stamp, engaged in selling, exchanging or giving away intoxicating liquors, but that such finding alone would not be applicable to the defendants or either of them.

Considering these instructions in the order specified, it is argued that the local option law being dependent upon a vote of the people, to determine whether or not it should be operative

within a specified territory, contravenes the organic law of the State by delegating legislative power, which fact is evidenced by the order of a county court whereby its mandate, and not the enactment, becomes the rule of prohibition. The power to enact a law was not delegated, but authority was conferred upon the people of Benton County to determine by a majority vote, whether or not a law, which had already passed for the entire State, should be applicable to such county: *Fouts v. Hood River*, 46 Or. 492 (81 Pac. 370: 1 L. R. A. (N. S.), 483).

The local option law (section 10) provides that, if a majority of the votes cast at an election be in favor of inhibition, the county court shall make an order declaring the result of the vote, and absolutely prohibiting the sale of intoxicating liquor within the prescribed limits. It is the majority vote of the electors in favor of prohibition that effectuates such result, and though the county court is required to make an order absolutely prohibiting the sale of intoxicating liquor, such declaration is only tantamount to a proclamation of the consequences which follow a canvass of the votes, and thus the sale is forbidden by operation of law and not by the county court.

18. The bill of exceptions shows that Thomas Bell, as a witness for the State, testified that, about the time stated in the complaint, he went into a building at Corvallis, formerly used as a saloon, and there talked with the defendant Kline; that at that time he obtained a half pint of brandy which was set out for him, for which he offered to pay, but Kline told him that an assessment would subsequently be made for the expense of the Corvallis Social & Athletic Club; that he thereafter paid an assessment of 40 cents; that he had not in the meantime procured any other goods at that place; that the sum so paid was more than the ordinary price of such liquor, and that he thought the assessment imposed upon him included his right to visit the clubrooms.

The "sale or gift" to which the court referred in the second instruction excepted to was evidently based on the testimony of Bell, in relation to the method pursued whereby he obtained the brandy and paid money, not for the intoxicating liquor, possi-

bly, but on account of an assessment to defray the expenses of the club. To dispel any doubt that might possibly arise in the minds of the jurors as to the nature of the disposal of the alcoholic drink, under the circumstances mentioned, the court spoke of the transfer of the property in the brandy as a "sale or a gift," and, in doing so, committed no error. The disposal of intoxicating liquor by a social organization to a member thereof, as indicated in the third exception to the instruction, has heretofore been discussed under the question of the incorporation of the Corvallis Social & Athletic Club, and needs no further elucidation at this time.

19. Section 18 of the local option law contains, *inter alia*, the following clause:

"The issue of a license or internal revenue special tax stamp by the federal government to any person for the sale of intoxicating liquors shall be *prima facie* evidence that such person is selling, exchanging or giving away intoxicating liquors."

The term "person," as used in this provision, is undoubtedly broad enough to include the word "corporation"; and, this being so, the fourth instruction, to the giving of which an exception was reserved, correctly stated the law applicable to the facts involved.

Other exceptions are noted, but believing them immaterial, the judgment is affirmed.

AFFIRMED.

Decided 7 Jan., 1908.

STATE v. BARTLETT.

93 Pac. 243.

CRIMINAL LAW—INSTRUCTIONS—CREDIBILITY OF TESTIMONY OF ACCUSED.

1. The court instructed that an accused is deemed a competent witness, and that while the jury should give his testimony such weight and credibility as they might consider it entitled to, yet they were to consider in connection therewith that accused was testifying in his own behalf; that they were not bound to consider his testimony as absolutely true, nor as equal to the testimony of a disinterested witness, but to bear in mind that defendant spoke in his own behalf, and that the jury should consider the great temptation which one so situated was under, so to speak, as to procure his acquittal. *Held*, that the instruction was erroneous, as seeming to leave an implication that it was incumbent on the jury to consider defendant's testimony as false, and for that reason to reject it.

CRIMINAL LAW—MISLEADING INSTRUCTIONS.

2. Any remarks, gestures, facial expressions, tones of voice, or in fact any language which might seem even to hint at what the court thought of the merits of the case, should always be avoided at a trial of the issues before a jury.

From Union: WILLIAM SMITH, Judge.

The defendant, E. W. Bartlett, was convicted of the crime of attempting to extort money, alleged to have been committed by unlawfully threatening to prosecute certain persons for gambling. From the judgment that followed he appeals, alleging error of the trial court in charging the jury.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Samuel White*.

For the State there was a brief over the names of *A. M. Crawford*, Attorney General, *Francis S. Ivanhoe*, District Attorney, and *Charles H. Finn*, with oral arguments by *Mr. Ivanhoe* and *Mr. Finn*.

MR. JUSTICE MOORE delivered the opinion of the court.

The defendant E. W. Bartlett was jointly convicted with one S. A. Gardinier of the crime of attempting to extort money, alleged in the information to have been committed by unlawfully threatening to accuse certain persons of the offense of gambling, and to prosecute them therefor. Bartlett appeals from the judgment which followed, and his counsel contend, *inter alia*, that the trial court erred in charging the jury. The instruction particularly complained of, and to the giving of which an exception was taken, is as follows:

"In this case the defendants went upon the witness stand as witnesses in their own behalf. I instruct you that under the statutes of this State a person accused or charged with the commission of a crime is, at his own request, deemed a competent witness, and while you are to give his testimony such weight and credibility as you consider it entitled to, yet you are to consider the fact in connection therewith that he is the accused person testifying in his own behalf. You are not bound to consider the testimony of the defendants as absolutely true, nor any part of it as absolutely true, nor as equal to the testimony

of disinterested witnesses. You are to bear in mind that the defendants speak in their own behalf to discharge themselves of a criminal accusation, and you are to consider the great temptation which one so situated is under, so to speak, as to procure his acquittal."

1. That part of the foregoing charge, commencing with the words, "You are not bound." etc., was evidently patterned after a quotation found in the works of a distinguished author (2 Thompson, Trials, § 2417), in a note to which it is said, "Approved in *Solander v. People*, 2 Colo. 48, 56." In the case to which attention is called in the note, the plaintiff in error, a woman, was indicted for manslaughter, and, at her trial, one Knauss, a witness for the prosecution, detailed certain declarations against interest which were imputed to her. Upon argument the counsel for the people insisted that the sworn statements of Knauss were entitled to credit, from the circumstance that the accused, though examined in her own behalf, had not contradicted his testimony, and that her counsel had not interrogated her in relation thereto, whereupon her attorney requested the court to give the following instruction:

"That, in the examination of the prisoner provided for by the statute, which examination extends only to the facts and circumstances of the cause on trial, and does not confer on the prisoner the right to testify to facts or circumstances tending to impeach any of the witnesses in the cause. Therefore, the fact that defendant did not testify to facts or circumstances calculated to impeach any of the witnesses sworn in the case is not to be taken as properly commented upon, or as a circumstance against her." The report of the case states, "but the court refused to so charge, and the prisoner excepted."

The jury were charged in relation to the law involved in the issue, and the court gave, *inter alia*, the instruction quoted in the latter part of section 2447, as indicated in 2 Thompson, Trials, but no exception thereto appears to have been reserved. The accused, having been convicted, appealed, and, in affirming the judgment, Mr. Chief Justice HALLETT refers to the requests made by the appellants' counsel for certain instructions, relating to the corroboration of the testimony of an accomplice, and says:

"The prisoner having elected to testify under the act of 1872 (9 Sess. Assem. p. 95), her testimony became a fair subject of criticism before the jury, and the counsel for the people was at liberty to analyze her testimony, to compare it with the other testimony in the cause, and comment upon the omissions and contradictions, if any, therein. The prisoner was at liberty to contradict Knauss, and to give her own account of the matters related by him, and the fact that she did not do so might well be considered by the jury in determining the credibility of Knauss: *People v. Dyle*, 21 N. Y. 578. The prisoner was not required to testify, and, by the terms of the statute, if she had chosen to remain silent, no inference of guilt could be drawn from her conduct. By taking the witness stand she opened the door to criticism, and cannot now complain that an effort was made to measure her testimony by the ordinary rules which govern human conduct."

The foregoing observation, relating to the declarations upon oath of the accused as a witness in her own behalf, constitutes the only reference made by the court to any instruction requested by her counsel or to any charge given to the jury as to her testimony. How, then, can it be said, as indicated in the note adverted to, that the language quoted in the text by the noted author, and as given by the court in the case cited, was approved, when the instruction does not appear even to have been challenged by counsel for the accused or commented upon in any manner by the justice who wrote the opinion? The only references to the case of *Solander v. People*, 2 Colo. 48, 56, that we have been able to find in the Colorado reports, relate to other questions. See, upon this subject, *Jones v. People*, 2 Colo. 355; *Union Gold Mining Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 576; *Jones v. People*, 6 Colo. 456 (45 Am. Rep. 526); *Minich v. People*, 8 Colo. 449 (9 Pac. 4); *Wisdom v. People*, 11 Colo. 174 (17 Pac. 519); *Babcock v. People*, 13 Colo. 518 (22 Pac. 817); *Thompson v. People*, 26 Colo. 505 (59 Pac. 51); *Johnson v. People*, 33 Colo. 237 (80 Pac. 133; 108 Am. St. Rep. 85).

In *People v. Cronin*, 34 Cal. 191, an instruction of similar import to that contained in the latter part of the charge complained of in the case at bar, was approved. In *People v. Mur-*

ray, 86 Cal. 31 (24 Pac. 802), Mr. Justice MCFARLAND, referring to the rule announced in the preceding case, says:

"That instruction has been approved in subsequent cases, and it is now too late to question its correctness; but if courts and prosecuting attorneys think it their duty to have an instruction on that subject in every case, they should be careful not to go further in that direction than courts have already gone. An instruction giving the general rule can do no harm, and is not of much importance, for every intelligent juror knows, without any instruction on the subject, that a defendant, whether innocent or guilty, is deeply interested in being acquitted. But when such an instruction is reiterated, and put into exceedingly strong language, so as to give it peculiar emphasis, it is too apt to lead the jury to believe that the court thinks the defendant in the particular case on trial to be unworthy of belief."

In *People v. Van Ewan*, 111 Cal. 144 (43 Pac. 520), the trial court, in referring to the declarations under oath made by the defendant as a witness in his own behalf, charged the jury as follows:

"In weighing his testimony you are to consider what he has at stake. You are to consider the temptations that may be brought to bear upon a man in his situation to tell a falsehood for the purpose of inducing you to acquit him, or to disagree."

The defendant, having been convicted, appealed, and in reversing the judgment, the court say:

"If the question were entirely an open one we would feel constrained to hold, upon principle, that any instruction at all as to the credibility of any witness, or the weight to be given to his testimony, is violative of Section 19 of Article VI of the Constitution, which provides that 'judges shall not charge jurors with respect to matters of fact,' and Section 1887 of the Code of Civil Procedure, which, referring to a witness, provides that 'the jury are the exclusive judges of his credibility.'"

It is further intimated that the instruction last above quoted was more restrictive than the charge approved in *People v. Cronin*, 34 Cal. 191. It will thus be seen that the Supreme Court of California practically condemned the instruction given in *People v. Cronin*, 34 Cal. 191, but felt impelled to follow

the rule thus announced, because of its repeated approvals for nearly a generation.

In *Johnson v. United States*, 157 U. S. 320 (15 Sup. Ct. 614: 39 L. Ed. 71), cited by counsel for the State in the case at bar, the jury were charged as follows:

"The defendant goes upon the stand before you, and he makes his statement—tells his story. Above all things in a case of this kind you are to see whether that statement is corroborated substantially and reliably by the proven facts; if so, it is strengthened to the extent of its corroboration. If it is not strengthened in that way, you are to weigh it by its own inherent truthfulness—its own inherent proving power that may belong to it."

This instruction was approved by the Supreme Court of the United States, but as the cause was originally tried in a federal court, where the rules of the common law prevail, thereby permitting the judge to comment upon the weight of the testimony, no other deduction could well have been made: *Carver v. Astor*, 4 Pet. 1, 79 (7 L. Ed. 761); *Magniac v. Thompson*, 7 Pet. 348, 389 (8 L. Ed. 709). The conclusion there reached, however, is not controlling in the case at bar, in consequence of our statute prohibiting such method of charging the jury.

In *Territory v. Romine*, 2 N. M. 114, a similar charge was upheld on the assumption that such an instruction was permissible under the rules of the common law, which at the time of that trial had not been changed. but subsequent thereto, and prior to the hearing of the cause in the Supreme Court a statute had been adopted by the legislative assembly of New Mexico, which precluded a court from commenting upon the weight of the evidence. In that case it is intimated that, after the passage of the statute, the giving of such an instruction would have been erroneous. Our statute, regulating the giving of instructions, was adopted in its present form, December 20, 1865 (Laws Or. 1865, p. 37), and is as follows:

"In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact": B. & C. Comp. § 139.

This section practically prohibits the giving of an instruction as to the weight of the evidence, for if a court cannot present the facts of a case, it is necessarily precluded from charging the jury in respect to any particular conclusion which might be deduced from a consideration of the testimony.

An early statute of this State prevented a defendant in a criminal action from becoming a witness for or against himself: Section 166, Title 1 of Chapter 16 of the Criminal Code, as compiled by Matthew P. Deady and Lafayette Lane. This section was amended October 25, 1880 (Laws 1880, p. 28), so as to read, as far as deemed involved herein, as follows:

"In the trial of or examination upon all indictments, complaints, information and other proceedings before any court. * * against persons accused or charged with the commission of crimes or offenses, the person so charged or accused shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court": B. & C. Comp. § 1400.

As this alteration was made after the passage of Section 139, B. & C. Comp., it would seem, from a construction of such amendment in *pari materia* with that section, that it had been impliedly amended, so as to permit the court to call the attention of the jury to the credibility of a defendant in a criminal action when he appeared as a witness in his own behalf. Our statute, elucidating the general principles of evidence, contains the following clause:

"A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character or motives, or by contradictory evidence; and where the trial is by the jury, they are the exclusive judges of his credibility": B. & C. Comp. § 695.

It has been the practice of courts to give this entire section, or the substance thereof, in charging juries. Construing this clause together with Section 1400, B. & C. Comp., it would further appear that Section 695, B. & C. Comp., was also impliedly amended, so as to allow the court to inform the jury

that a defendant in a criminal action, when he appeared as a witness in his own behalf, is interested in any verdict which they might return—a fact of which they have knowledge without such declaration: *People v. Murray*, 86 Cal. 31 (24 Pac. 802).

An instruction stating that, while the defendant in a criminal action is a competent witness in his own behalf, the jury, nevertheless, have the right to take into consideration his interest in the result of the trial, and all the facts and circumstances of the case, and to give his testimony only such weight as they, in their judgment, think it entitled to—has been held proper: *Smith v. State*, 107 Ala. 139 (18 South. 306); *Hamilton v. State*, 62 Ark. 543 (36 S. W. 1054); *State v. Ryan*, 113 Iowa, 536 (85 N. W. 812); *People v. Calvin*, 60 Mich. 113 (26 N. W. 851); *Gatliff v. Territory*, 2 Okl. 523 (37 Pac. 809); *Emery v. State*, 101 Wis. 627 (78 N. W. 145). Under the rule thus announced, the first part of the charge in the case at bar, which was manifestly modeled after section 2447 (2 Thompson, Trials), a note to which is as follows: "Approved in *State v. Jones*, 78 Mo. 280." is supported by authority, though the jury were not instructed to take into consideration all the facts and circumstances of the case, nor informed that they were the exclusive judges of the defendant's credibility. No request, however, appears to have been made to enlarge the instruction in these particulars.

In *Chambers v. People*, 105 Ill. 409, the following charge was given:

"The court instructs the jury, for the people, that they are not bound to believe the evidence of the defendant in a criminal case, and treat it the same as the evidence of other witnesses, but the jury may take into consideration the fact that he is defendant, and give his testimony such weight as, under all the circumstances, they think it entitled to."

In that case it was held that such instruction was calculated to mislead, and was, therefore, erroneous. A similar instruction was also condemned in *Sullivan v. People*, 114 Ill. 24 (28 N. E. 381), and *Hellyer v. People*, 186 Ill. 550 (58 N. E. 245).

In *State v. Pomeroy*, 30 Or. 16 (46 Pac. 797), the jury were instructed as follows:

"In this case the defendant and members of his family have given testimony. You have no right to reject the testimony they have given, simply because it comes from a source in which there would be strong motives to give the most favorable coloring possible to the facts on behalf of the defendant, but you have a right to consider, and you should consider, that testimony the same as you would other testimony, taking into account the relationship of the parties and the motives which may induce them to testify."

The defendant, having been convicted, appealed, and, in reversing the judgment, it was held that the instruction was erroneous, as an expression of opinion on the motives of the witnesses.

Any person who carefully notices the trial of a cause before a jury must surely observe the attention which they give to the remarks, gestures, facial expressions or tones of voice which the judge may adopt, in their evident desire to gain from him some information as to the kind of verdict they think he would expect in the case. Any language, therefore, which might seem even to hint at what the court thought of the merits of a case, ought always to be avoided at a trial of the issue before a jury. Though the judge, in the instruction complained of, said to the jury: "You are not bound to consider the testimony of the defendants as absolutely true, * * and you are to consider the great temptation which one so situated is under, so to speak, as to procure his acquittal"—he seems to leave an implication that it was incumbent upon them to consider the defendants' testimony as false, and for that reason to reject it: *Clark v. State*, 32 Neb. 246 (49 N. W. 367).

We think the language thus used is not warranted, and hence the judgment is reversed, and a new trial ordered.

REVERSED.

Decided 7 Jan., 1908.

STATE v. TAYLOR.

98 Pac. 252.

ASSAULT—ASSAULT WITH COWHIDE—SELF DEFENSE.

1. The offense under Section 1766, B. & O. Comp., declaring a punishment for one who assaults another with a cowhide, having at the time in his possession a gun or other deadly weapon, with intent to intimidate and prevent the other from resisting, cannot involve the element of self defense in favor of the assailant.

SAME—UNNECESSARY FORCE IN REMOVING TRESPASSER.

2. The gist of the offense under Section 1766, B. & O. Comp., being to beat another with a cowhide, or like thing, while being armed with a deadly weapon, with intent to intimidate and to prevent the other from resisting, the statute does not apply to an altercation or ordinary assault and battery, though the assailant is armed with a gun; so that, where the element of removal of a trespasser by defendant is involved, the use of more force than necessary for such purposes would constitute an assault, but would not be evidence of a violation of such statute.

SAME—INFORMATION.

3. The crime of "assault being armed with a cowhide," denounced by Section 1766, B. & O. Comp., declaring a punishment if any person shall assault another "with a cowhide, whip, stick, or like thing," under certain conditions, is not charged by an information which, in the preliminary part, names defendants' offense as "assault, being armed with a leather strap," and in the charging part states that they, being armed with a leather strap, assaulted a person, a description of the leather strap being necessary to show that it was a like thing to a cowhide, whip, or stick.

From Baker: WILLIAM SMITH, Judge.

Defendant was convicted of the crime of assault, being armed with a cowhide, as defined by Section 1766, B. & C. Comp. From the judgment rendered thereon he appeals. REVERSED.

For appellant there was a brief with oral arguments by *Mr. Charles H. Carter* and *Mr. Woodson L. Patterson*.

For the State there was a brief and an oral argument by *Mr. Gustav Anderson*, Deputy District Attorney.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. Information was filed against the defendants seeking to charge them with the crime of assault, being armed with a cowhide, as defined by Section 1766, B. & C. Comp., and which provides:

"Assault, Being Armed with a Cowhide. If any person shall assault, or assault and beat another with a cowhide, whip, stick

or like thing, having at the time in his possession a pistol, dirk or other deadly weapon, with intent to intimidate and prevent such other from resisting or defending himself, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than ten years."

The information is in the following language:

"R. H. Taylor and John S. Traut, the above-named defendants, are accused by Leroy Lomax, District Attorney of the Eighth Judicial District of the State of Oregon, by this information, of the crime of 'assault, being armed with a leather strap,' committed as follows: The said R. H. Taylor and John S. Traut did on the 8th day of April, A. D. 1907, in the County of Baker and State of Oregon, then and there being and acting together, and being then and there armed with a leather strap, unlawfully and feloniously assault, strike, hit and beat one Exilda Mitchell upon the body and head of her the said Exilda Mitchell with said leather strap, which said leather strap the said R. H. Taylor and the said John S. Traut then and there had and held in his hands while within striking, hitting and beating distance of her, the said Exilda Mitchell. The said R. H. Taylor and the said John S. Traut having at the time in his possession a pistol and a gun, the said pistol and the said gun being then and there a deadly weapon, with intent then and there and thereby to intimidate and prevent her, the said Exilda Mitchell, from resisting or defending herself, contrary to the statutes in such cases made and provided," etc.

Defendants were tried thereon, and convicted of the crime sought to be charged, and on June 27, 1907, sentenced to one year in the penitentiary. Exceptions were taken at the trial to various instructions given by the court, of which instructions we shall notice only the second and third, relating to the right of self-defense, and liability for assault in case more force is used than is necessary for such defense, and the right to defend the possession of real property.

This statute was evidently not intended to cover cases of ordinary assault, or assault with a dangerous weapon, as defined by Sections 1771 and 1772, B. & C. Comp., but is intended to cover a particular offense, where the assailant, having in his possession a gun with intent to intimidate the object of his

attack and thus prevent resistance, administers a cowhiding or beating. This offense can by no possible construction involve the element of self-defense in favor of the assailant. The intention to intimidate by means of a gun is the element that makes it a felony, by which the assailed person is compelled, through fear, to submit to the punishment. Neither could there be any element of trespass involved in the case. To constitute a liability under this statute, the defendant must be armed with a deadly weapon, with the intent and for the purpose of intimidation, to enable him to administer a cowhiding upon the object of his attack, and whether the assailed person is a trespasser or resists such assault, can constitute no defense to the assailant; but the proof in such a case must be clearly brought within the spirit of the statute, and it cannot be made to apply to the case of an altercation, or an ordinary assault and battery, even though the assailant is armed with a gun. If the element of the removal of a trespasser from one's property is involved, as presented to the jury by the third instruction, then the use of more force than is necessary for that purpose would constitute an assault, but would not be evidence of a violation of this statute.

2. Instruction No. 2, as given by the court, reads:

"If a person is assaulted by another, such person is then justified in using such force as may be reasonably necessary to defend himself; but if such person under pretext of self-defense exceeds the bounds of what is reasonably necessary for such defense, then such person would nevertheless be guilty of the assault."

Here the court instructs the jury that if the defendants are assaulted, they have a right to resist such assault, but an excess of force in such resistance would constitute guilt under this statute, which lacks the principal element of that crime, viz., being armed with intent to intimidate, and thus enable them to inflict the punishment. In Mississippi, under a similar statute, it is held that the gist of the offense is in being armed with a pistol with intent to intimidate the person assaulted and prevent him from defending himself: *Lawson v. State*, 62 Miss. 556.

The case was presented to the jury upon the theory that if the defendants, being armed, assaulted Mrs. Mitchell, they were guilty, or, if they acted at first in self-defense, but used more force than was necessary in such defense, they were guilty of the crime charged, thus losing sight of the element of intimidation to enable defendants to administer a castigation; hence the second instruction is erroneous in authorizing a verdict of guilty of the charge upon proof of more force than necessary for defense of the person, and the third instruction contains a similar error, in authorizing a conviction if more force is used than necessary to remove a trespasser from real estate.

3. The sufficiency of the indictment is also questioned by the defendants, in that it does not charge the crime for which they were tried. In the statute of 1864 the name of this crime is given in the index to the sections at the beginning of chapter 43, of which it is a part, and also on the margin opposite section 527, its original number, as, "assault, being armed with a cowhide," and was so adopted by the legislature, and the name of the crime thus became part of the law (*State v. Vowels*, 4 Or. 324; *State v. Nease*, 46 Or. 433: 80 Pac. 897), and "assault, being armed with a strap," does not name the crime defined by this section. However, an error in the name of the crime in the preliminary part of the information is not fatal if the charging part is sufficiently specific: *State v. Sweet*, 2 Or. 127; *State v. Jarvis*, 18 Or. 360 (23 Pac. 251). But the charge is, "did assault, strike, hit and beat one Exilda Mitchell * * with said leather strap." The allegation contains nothing to bring the strap within the class of instruments mentioned under "cowhide, whip, stick or like thing." In Alabama, under a similar statute providing that an assault with a cowhide, stick or whip, having in his possession a pistol with intent to intimidate, an indictment that charged an assault with a rope, stick or whip was held sufficient to sustain a conviction for assault, but insufficient if the conviction had been for the offense charged: *Higginbotham v. State*, 50 Ala. 133. Where the instrument used is not one of those named in the statute, then it must be so described as to bring it within the class named.

Where a statute, in defining a crime committed by use of weapons, mentions certain weapons "or other deadly weapon," it is held that those named in the statute need not be described as deadly weapons, but if another than those named in the statute is relied upon as coming within the term "other deadly weapon," it must be so averred as to bring it within that designation: *State v. Sebastian*, 81 Mo. 514; *State v. Hoffman*, 78 Mo. 256; *State v. Painter*, 67 Mo. 84; *State v. Porter*, 101 N. C. 713 (7 S. E. 902). The language of this statute is, "with a cowhide, whip, stick or like thing." If the instrument used was one mentioned in the statute, the description of it need only disclose that fact; but if, as in this case, it is some other instrument relied upon as coming within the term "or like thing," then it must be so set forth to disclose that it is a like thing to a cowhide, whip or stick, and it is not sufficient to refer to it as a leather strap. Therefore the information is insufficient to charge the crime defined by Section 1766, B. & C. Comp., but is sufficient to charge the crime of assault and battery.

Therefore the judgment of the lower court will be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion. REVERSED.

Decided 7 January, 1908, rehearing denied 11 February, 1908.

ROBINSON v. ROBINSON CHEESE COMPANY.

128 Pac. 258.

APPEAL AND ERROR—TRANSFER OF CAUSE—TRANSCRIPT—TIME FOR FILING.

Under Section 549, B. & C. Comp., an appellant is required to file a transcript within thirty days after the perfection of the appeal. *Held*, that where, on notice of appeal, the trial judge entered in the bench docket a memorandum that appellant was given sixty days to file a bill of exceptions, the memorandum did not amount to an order enlarging the time to file a transcript.

From Tillamook: WILLIAM GALLOWAY, Judge.

Action by R. Robinson against the R. Robinson Cheese Company. From a judgment in favor of plaintiff, defendant appeals. Respondent now moves to dismiss the appeal.

DISMISSED.

Mr. William H. Holmes for the motion.

Mr. Ralph R. Duniway, contra.

MR. JUSTICE MOORE delivered the opinion of the court.

This is a motion to dismiss an appeal. The plaintiff, on May 2, 1907, secured in the circuit court for Tillamook County, a judgment against the defendant, a corporation, whereupon the latter in open court gave oral notice of appeal, and on the same day served and filed an undertaking therefor. The judge at that time entered in the bench docket the following memorandum: "May 2d. Motion for new trial denied. Counsel for defendant saves exceptions and gives notice of appeal, and is given sixty days to file bill of exceptions. Plaintiff takes judgment." Though no exception was taken to the sufficiency of the sureties in the undertaking, and no other order obtained enlarging the time for the performance of any act relating to the appeal, the transcript was not filed in this court until July 22, 1907. The statute regulating the manner of taking appeals contains the following clauses:

"Within five days after service of said undertaking, the adverse party or his attorney shall except to the sufficiency of the sureties in the undertaking, or he shall be deemed to have waived his right thereto. * * From the expiration of the time allowed to except to the sureties in the undertaking. * * the appeal shall be deemed perfected": B. & C. Comp. § 549. "Upon the appeal being perfected, the appellant shall, within thirty days thereafter, file with the clerk of the appellate court a transcript. * * If the transcript * * is not filed with the clerk of the appellate court within the time provided, the appeal shall be deemed abandoned, and the effect thereof terminated, but the trial court or the judge thereof, or the supreme court or a justice thereof, may, upon such terms as may be just, by order enlarge the time for filing the same": B. & C. Comp. § 553.

An examination of these provisions in connection with the facts hereinbefore stated will show that the appeal was perfected May 7, 1907, but that the transcript was not filed in this court within 30 days thereafter. The question presented by this motion is whether or not the entry in the bench docket of the memorandum hereinbefore quoted can be construed as

an order enlarging the time to file a transcript. The filing of a transcript in an appellate court is the consummation of the means whereby that tribunal obtains jurisdiction of a cause. A bill of exceptions cannot be incorporated into a record until it has been made a part thereof by being allowed and certified to by the judge. When a court by an order enlarges the time in which to file a transcript, it thereby impliedly extends the time in which to secure a bill of exceptions, on the assumption that the greater regulation necessarily includes the less; but, as an order in an inferior matter does not embrace a superior prescription, it follows that the memorandum hereinbefore set forth, if it be treated as an order duly made and entered, does not enlarge the time for the filing of the transcript.

No jurisdiction of the appeal having been obtained, the motion must be allowed, and it is so ordered. **DISMISSED.**

Decided 7 January, rehearing denied 4 February, 1908.

JACKSON v. SUMPTER VALLEY R'Y CO.

98 Pac. 356.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

1. Contributory negligence is a matter of defense and the burden of establishing it is on defendant, unless plaintiff's declaration or evidence establishes it.

TRIAL—NONSUIT.

2. The province of a motion for nonsuit is in the nature of a demurrer to the evidence, and when it is sought to take advantage of a defect in the pleadings by such a motion, the pleadings should be construed liberally, as if on a motion by defendant for judgment, notwithstanding the verdict against him.

PLEADING—DEFECTS.

3. A party relying on a technical defect in a pleading is subjected to observance of technical rules.

RAILROADS—INJURY TO ANIMALS—CONTRIBUTORY NEGLIGENCE—PLEADINGS.

4. Where, in an action against a railroad company for killing cows on its track, the company as an affirmative defense alleged that plaintiff negligently herded cows along the right of way within switching limits at a station, with knowledge that the right of way was dangerous, a reply denying the averments of the answer, except that "certain cows of the plaintiff, being then and there under the immediate care, custody and control of plaintiff," construed liberally in favor of plaintiff, did not admit contributory negligence.

SAME—PLEADINGS.

5. An answer, in an action against a railway company for killing cows on its track, which alleges that plaintiff negligently herded "certain" cows along

the right of way within switch limits at a station, with knowledge of the danger, and that he negligently permitted the stock to remain on and along the track, and that thereby the stock sustained injuries, etc., does not, on a strict construction, raise the defense of contributory negligence, in the absence of any identification of the "certain" cows with those whose killing is sued for.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

6. In an action against a railway company for killing animals on its track, the question of contributory negligence of the owner, *held* for the jury.

TRIAL—QUESTION FOR JURY—EVIDENCE.

7. Where different deductions may reasonably be drawn from the evidence in a cause, the issues are for the jury; and, to justify the granting of a nonsuit, the facts and inferences must be undisputed.

RAILROADS—INJURY TO ANIMALS—CONTRIBUTORY NEGLIGENCE.

8. Whether one is guilty of contributory negligence in turning his stock out to graze on unclosed lands near a railroad track, is a question for the jury.

NEGLECT—CONTRIBUTORY NEGLIGENCE—ORDINARY CARE.

9. One is not guilty of contributory negligence, unless he fails to exercise ordinary care; and there is no want of ordinary care when, under the circumstances, he does not omit anything which an ordinarily prudent person similarly situated would not have omitted.

SAME—QUESTION FOR JURY—NEGLECT.

10. Where both the duty to exercise care and the extent of its performance are to be ascertained as facts, the jury alone can determine what is negligence, and whether it has been proven.

RAILROADS—INJURY TO ANIMALS—STATION GROUNDS.

11. In an action against a railroad for injuries to animals on its track, the evidence showed that there were about one and one-half miles of unfenced track from one station towards another; that it was three-quarters of a mile from the station to the head of a switch for a siding running back toward the station used for storing engines, etc., and that further on in the direction of the other station, about one hundred and fifty yards from the switch was a branch line leaving the main line and forming the head of a "Y." The animals were killed near the switch for the siding. There was nothing to show that the siding was used in connection with a depot at the station. *Held*, that the question whether the animals entered the track within depot grounds was for the jury.

APPEAL—REVIEW OF EVIDENCE—BILL OF EXCEPTIONS.

12. Where the evidence is not in the bill of exceptions, and a transcript of what appears to be evidence is in the record, but the same is not identified by the court, or certified to be any or all of the testimony in the case, the court on appeal will not consider it.

From Baker: WILLIAM SMITH, Judge.

Statement by MR. COMMISSIONER SLATER.

Plaintiff sues on two causes of action to recover in damages the value of some of his milch cows, which were killed and injured by defendant's moving railroad cars and engine on its track near the town of Sumpter, in Baker County. A nonsuit

was granted as to the first cause of action, which is not to be considered here. For the second cause of action it is averred that a number of plaintiff's cows, on August 6, 1906, went upon defendant's unfenced track, and four of them were killed and two were injured by one of defendant's moving trains and engine drawing the same. The answer denies generally the averments of the complaint, excepting defendant's incorporation and ownership and operation of the railroad leading from Baker City to Sumpter on which the cows were killed.

As an affirmative defense, it is alleged, in substance, that on August 6, 1906, certain cows of plaintiff being then and there under the immediate care, custody, direction and control of plaintiff and his servant, one Robert Allen, were by them carelessly and negligently, and without right or authority, wrongfully herded and pastured upon and along defendant's right of way and railroad track, within its switching and station yards, inside the corporate limits of the City of Sumpter, and that plaintiff and his servant, Robert Allen, well knowing that defendant's trains were regularly passing over said tracks and right of way, and well knowing said stock was within defendant's switching yards, and that said right of way and said switching yards were dangerous and unsafe places for said stock to be, and that they had no right to have said stock in said places, carelessly and negligently permitted said stock to remain upon and along said track and right of way, and that thereby said stock sustained the injuries alleged, if at all, and that whatever damage plaintiff may have suffered from said injuries was due solely to his own said negligence and carelessness in driving and herding his said stock upon and along defendant's track and right of way, as aforesaid, and not to any fault or negligence of this defendant. By the reply, plaintiff denied generally all the averments of the answer, excepting that "certain cows of the plaintiff, being then and there under the immediate care, custody and control of plaintiff." After the issues were thus joined a trial was had before a jury, and at the conclusion of plaintiff's testimony defendant moved a nonsuit, on the ground that the evidence shows plaintiff to have been guilty

of contributory negligence sufficient to bar his right to recover. This being overruled, defendant offered his testimony, and the cause was submitted to the jury, which returned a verdict in favor of plaintiff in the sum of \$330, upon which judgment was entered, from which defendant appeals. **AFFIRMED.**

For appellant there was a brief over the names of *John L. Rand* and *Vernor W. Tomlinson*, with an oral argument by *Mr. Tomlinson*.

For respondent there was a brief with an oral argument by *Mr. Charles H. McColloch*.

Opinion by MR. COMMISSIONER SLATER.

1. The first and principal error relied upon to reverse the judgment is the denial by the court of defendant's motion for a nonsuit to the second cause of action. In this State contributory negligence is a matter of defense, and the burden of establishing it is on the defendant: *Johnston v. O. S. L. Ry. Co.* 23 Or. 94 (31 Pac. 283); *Grant v. Baker*, 12 Or. 329 (7 Pac. 318). But, if plaintiff's declaration or evidence establishes his own contributory negligence, it bars his recovery, no matter where the burden rests: 7 Am. & Eng. Ency. (2 ed.), 454; *Tucker v. Northern Terminal Co.* 41 Or. 82 (68 Pac. 426); *Scott v. Oregon Ry. & N. Co.* 14 Or. 211 (13 Pac. 98).

To support its contention, counsel for defendant urges with much earnestness that the pleadings on the part of plaintiff admit that the cattle went upon the track while under the immediate care, custody and control of plaintiff. This arises, it is argued, from the form of the denial used in the reply. What the pleader intended to admit by excluding the quoted words from the effect of his denial, is doubtful. Defendant's counsel arrive at their conclusion by a strict construction of the language quoted, and contend that such should be the rule. But, if their assumption as to the rule of construction and their interpretation of the implied admission be correct, the result would have entitled defendant to a judgment on the pleadings, which they should have asked before going to trial, and not wait to raise the question on motion for nonsuit.

2. The province of a motion for a nonsuit is in the nature of a demurrer to the evidence (*Brown v. Oregon Lumber Co.* 24 Or. 315: 33 Pac. 557), and it is an unusual method of taking advantage of a defect in the pleadings, and the appellant, rather than respondent, should be held to strict rules.

"It has been held," says Mr. Justice THAYER, in *Specht v. Allen*, 12 Or. 117-122 (6 Pac. 494, 495), "that when a pleading did not contain a cause of action or defense, as the case might be, and the objection to it was made for the first time at the trial by opposing the introduction of evidence to support it, the party would be deemed to have waived any objection to its sufficiency. I am of the opinion that the party in such case should be compelled to resort to a motion for judgment, notwithstanding the verdict, in case one were to be rendered against him, as the party interposing the pleading ought, when it had not been demurred to, to be entitled to the presumptions a verdict in his favor would afford. That appears to me to be the course the code intends should be pursued. But, on the other hand, where a party has no sufficient pleading to stand upon, and judgment has gone against him, he is not in a favorable condition to ask for its reversal, particularly where a verdict would not have cured the defect. An appellate court in such a case would, I think, consistently determine that the error had not injured him."

So, then, in this instance, the reply should be construed as if the question arose upon a motion by defendant for a judgment, notwithstanding the verdict, that is, liberally, so that, if possible, the verdict may be sustained.

3. Under these limitations, we are constrained to hold that the language used in the reply was intended to mean no more than that certain cows of the plaintiff were at the time of the accident under the care, custody and control of plaintiff, not that they were under his care, custody or control at the time they went upon the track and right of way of the defendant. When so construed and applied to the testimony hereinafter considered, plaintiff has relieved himself from any necessary inference of negligence on his part. But defendant is in no better condition, even if the language of the reply be construed strictly. A party who relies upon a technical defect is sub-

jected to observance of technical rules: *Hermann v. Hutcheson*, 33 Or. 239 (53 Pac. 489); *Small v. Lutz*, 34 Or. 131 (55 Pac. 529, 58 Pac. 79); *Bilyeu v. Smith*, 18 Or. 335 (22 Pac. 1073).

4. The admission, claimed by defendant to be included in the language of the reply above quoted, could not arise, except that reference be made to the affirmative matter of the answer to interpret it. The words "certain cows of the plaintiff" of themselves do not necessarily mean the cows mentioned in the complaint upon which the cause of action is based. The answer contains the same language, and there is nothing elsewhere therein that identifies the "certain cows of the plaintiff" to be those described in the complaint. For all that appears upon the face of the pleadings, the averments of the answer may be true, and yet be no bar to a recovery on the cause of action set forth in the complaint. Plaintiff may have had another and different cause of action, which for some reason he did not see fit to include in his complaint.

It necessarily follows that upon a strict construction of the answer, the defense of contributory negligence is not in this case; at least defendant, when judgment has gone against him, is not in a favorable position to ask for its reversal for this particular alleged error: *Specht v. Allen*, 12 Or. 117 (6 Pac. 494). Assuming, however, that the issue of contributory negligence is made by the answer, we will now examine plaintiff's testimony and ascertain whether any indisputable inference can be drawn from the uncontradicted facts which disclosed the omission or commission of any act by plaintiff or his servant, which the law adjudges negligent. The facts disclosed by the record are: That plaintiff operates a dairy in the vicinity of Sumpter, and had in his herd about 38 cows. That in the month of August, 1906, he pastured his cows for the most part on a farm called in the record the "Jett" place, situate about 2 miles east from the dairy and about $1\frac{1}{2}$ miles south and east of Sumpter Depot, and through which defendant's main line going from Sumpter to Baker City passes, but sometimes the cows were turned out to feed upon the commons. That defendant's track is unfenced from Sumpter Station to the Jett place. On the morn-

ing of August 6, 1906, the cows were driven by one of plaintiff's hired men out to feed upon the commons, and left back of the Jett place and in the vicinity of the smelter, which is upon or near a branch road leaving the main line between $1\frac{1}{4}$ and $1\frac{1}{2}$ miles south and east of the Sumpter Depot and going to Austin. That between the smelter and defendant's right of way and plaintiff's barn or dairy the country is not fenced, and is covered with brush, but affords good pasturage. About 3 o'clock in the afternoon of that day Robert Allen, plaintiff's employee, whose duty was to drive the cows home in the evening, went from the dairy easterly down the valley hunting some stray horses, intending to bring the cows home on his return in the evening. As he went he noticed three of the cows coming towards Sumpter up the track of the branch road from a quarter to a half mile distant from the main track, and about one half mile from where the cows were killed. The rest were scattered between the Jett place and the smelter. Allen went on down the valley, secured the horses, and returned, arriving in the same vicinity between half past 5 and 6 o'clock. He then saw 15 or 20 head of plaintiff's cows feeding and drifting toward Sumpter on defendant's right of way, and between the arms of a "Y" formed by the branch line to Austin, the main line to Baker City, and a connecting curve. The horses having taken a canter along the county road toward home, Allen turned out of the road after the cows and drove those nearest him from the "Y" a distance of 200 or 300 yards to the county road, then turned back to get 17 or 18 others which had gone ahead up the main track toward Sumpter beyond the junction a distance of some 450 feet. At this point on the west side of the track, there is a rocky point within 5 feet of the center of the track, and on the east side within about 30 feet is Powder River. The space between the track and the river was at one time traveled as a county road, but for a long time prior to the date of the accident, it had been filled within a few feet of the track with sawlogs and brush, leaving very little space for loose stock to travel on. But there is a stock trail there, winding through the logs for a distance of 75 to 100 yards, then turns off to the

left into the county road. About 150 feet further up the track toward Sumpter from the rocky point is a switch for a short siding called "Sumpter Siding," and 25 feet beyond this switch is the frog of the switch. Sumpter Depot or Station is three fourths of a mile distant from the switch. Allen had consumed about 10 minutes of time in getting the first bunch of cows out of the "Y" and into the county road, when he turned back to get the remainder. These were 200 or 300 yards from where the first ones were found, and were feeding along the track toward this rocky point. Before Allen overtook them they had passed this point, and just as he arrived at the point he saw the train coming from Sumpter toward him. He endeavored to get in ahead of the cows and turn them off the track, but the engine struck two of the cows at the frog, injuring them, and killed four others at the switch stand.

5. The theory of the defense is, that Allen was driving the stock homeward when they first went upon defendant's track, and that he was attempting to drive them along this trail on the right of way because by that route it was one quarter of a mile nearer to the dairy than by the county road. But he positively denies both of these assertions, and swears that he never at any time drove them through there; that when he first saw the cows upon the right of way he immediately went to them and began rounding them up and getting them off the right of way into the county road, taking those first that were nearest to him, preparatory to driving them home; that he had been engaged in that matter no more than 10 minutes when the cows were killed. To support its theory, however, defendant on cross-examination of plaintiff, offered in evidence, as containing admissions against his interest, what purports to be an owner's statement of stock injured or killed, with plaintiff's name as claimant typewritten at the bottom thereof, under which is written "per G. E. Allen." This statement is upon a printed blank form furnished by the company, and is in the form of questions and answers. It contains a statement of the time and place of the accident, a description and the value of the cows injured and killed, and, besides others, these questions and

answers: "Was stock in charge of any one at the time? If so, who? Robert Allen. State how you know the stock was struck by the train? The cows were being driven home." Plaintiff swears that he did not personally know how the stock were killed, or whether they were being driven home by any one; that, by telephone, he directed G. E. Allen to fill out and present this claim blank for him, giving Allen, at the time, information about the number, description and value of the stock, and told him that Robert Allen could give him other necessary facts; that he never saw the blank after it was filled out, and did not know that it contained such answers. Robert Allen swears that he did not give this particular information to his father, G. E. Allen. Under such circumstances, it could hardly be said, as a matter of law, that plaintiff is bound by the answers; but, if he were, it is but a statement, not conclusive, and is subject to explanation.

6. On the face of it, without explanation, the statement is that at the time of the accident the stock was in charge of Allen and were being driven home by him, not that they were in his charge when they went upon the track. When, however, the statements are placed with the explanatory facts as disclosed by the evidence of Allen, it can at least be said that different deductions may honestly and reasonably be drawn therefrom by different minds, and under such circumstances the question is one proper to be submitted to a jury: *Hedin v. Suburban Ry. Co.* 26 Or. 155 (37 Pac. 540).

7. It is also contended by defendants that Allen was negligent in not going first to those cows that were on the main track and removing them; for, it is argued, they were in the most danger, and his duty was to attend to them first. It may be conceded that it is the law that one who sees his cattle in danger upon a railroad track and can by reasonable exertions get them off, he is bound to do so (*Milburn v. Kansas City, etc., Co.* 86 Mo. 104), or that one having stock under his immediate care, custody and control, who voluntarily drives or puts them in a place of danger, or carelessly permits them to wander from his control into a place of danger, is guilty of contributory neg-

ligence: *Keeney v. O. R. & Nav. Co.* 19 Or. 291 (24 Pac. 233); *Ohio & Missouri Ry. Co. v. Eaves*, 42 Ill. 288. But a motion for a nonsuit is in the nature of a demurrer to the evidence. It admits the truth of plaintiff's evidence and of every inference of fact which the jury may legally draw from it. The sufficiency of the evidence is for the jury, provided the court shall be of the opinion that there is any evidence tending to sustain the complaint: *Brown v. Oregon Lumber Co.* 24 Or. 315 (33 Pac. 557). And to justify granting a nonsuit facts should be not only undisputed, but conclusions to be drawn from them indisputable. If different minds may honestly draw different conclusions from the facts, though undisputed, the case should be left to the jury: *Peabody v. O. R. & N. Co.* 21 Or. 121 (26 Pac. 1053; 12 L. R. A. 823).

8. As a matter of law, then, the court cannot say that plaintiff was guilty of contributory negligence in turning his stock out to graze on uninclosed lands near defendant's track or depot. That is a question for the jury: *Wilmot v. Oregon R. Co.* 48 Or. 494 (87 Pac. 528; 7 L. R. A. (N. S.), 202). Nor if plaintiff's testimony is to be believed, can negligence be imputed to him because his stock was found upon defendant's track. They were not in his immediate care, custody or control when they went upon the track, nor in the care of his servant, nor did either of them carelessly permit them to wander from his control into the place of danger where they were found.

9. If counsel by argument can draw a different inference from the evidence, it is derived only by the process of weighing testimony and by giving credence to one piece of testimony and rejecting another where there is a conflict. But when the right determination of a case depends upon the weight to be given evidence, it is for the consideration of the jury: *Anderson v. North Pacific Lumber Co.* 21 Or. 281 (28 Pac. 5). It is undisputed, however, that the servant about 10 minutes before the accident found plaintiff's stock in a place which imparted notice of danger, not notice of a present and imminent danger by seeing a train approaching, for that is not the fact, but because the track itself is a warning of possible danger: *Dur-*

bin v. Oregon R. & Nav. Co. 17 Or. 5 (17 Pac. 5: 11 Am. St. Rep. 778). He did not then know that any train was due from either direction, and he was compelled to act on the assumption that one part of the track was no more dangerous than another. Hence he first attended to those nearest to him. Had the fact been that when he first came upon the ground he saw a train coming from the opposite direction, or that he knew that a train was then due from that direction, it may have been his duty to have gone first to those cows that were nearest to the anticipated danger; but the facts show that Allen immediately upon discovery of the dangerous position of the cows, went with reasonable diligence to the scene and made at least some effort in good faith to perform his duty. the degree of which is for the jury: *Richmond v. McNeill*, 31 Or. 342 (49 Pac. 879). There could be no contributory negligence by plaintiff, except there is a failure on his part, or on the part of some person with whose negligence he is chargeable, to exercise ordinary care to avoid the injury, and such lack of ordinary care is the proximate cause of the injury: 7 Am. & Eng. Ency. (2 ed.), 373. And there has been no want of ordinary care, when, under all the circumstances and surroundings of the case, the person injured, or those whose negligence is imputable to him, did or omitted nothing which an ordinarily careful and prudent person similarly situated would not have done or omitted: 7 Am. & Eng. Ency. (2 ed.), 378.

10. When both the duty and the extent of its performance are to be ascertained as facts, a jury alone can determine what is negligence and whether it has been proven: *West Phila. Pass. Ry. Co. v. Gallagher*, 108 Pa. St. 524; *Robinson v. Cone*, 22 Vt. 213 (54 Am. Dec. 67). The court did not err in denying defendant's motion for a nonsuit.

11. The court refused to instruct the jury upon defendant's request to return a verdict in its favor, and this action of the court is assigned as error. This request was based upon no other contention than that made to support the motion for nonsuit, and that has been considered and disposed of adversely to de-

fendant. Defendant excepted to the giving of this instruction: "Whether or not defendant should have fenced that portion of its track upon which plaintiff's cattle entered is a matter for your determination from the evidence. If you find from the evidence that that portion of defendant's track was within defendant's depot yards, then the defendant was under no obligation to fence; otherwise it should have fenced," and error is assigned on that account. It is insisted that as evidence in this case is not conflicting or uncontradicted, it was not a question for the jury to determine whether or not the defendant ought to have fenced its track at the place or places where plaintiff's cattle were killed, or whether or not such places were within defendant's depot and switching yard, but that it was a matter of law for the court to declare.

Plaintiff's evidence shows that there are about $1\frac{1}{2}$ miles of unfenced track from Sumpter toward Baker City; that it is three fourths of a mile from Sumpter to the head of a switch for a siding running back towards Sumpter about 200 feet, which is used for storing slab wood for the use of defendant's engines; that further on in the direction of Baker City, about 150 yards from this switch, the branch line to Austin leaves the main line and forms the head or point of the "Y." The cows were killed near the switch for the "Sumpter Siding," and on the side thereof toward Baker City. There is no suggestion in plaintiff's evidence that Sumpter Siding was a part of or was used in connection with the depot at Sumpter.

12. The defendant's evidence is not found in the bill of exceptions; but there is on file a separate transcript of what appears to be some evidence taken in this case, and includes what purports to be some, at least, of defendant's testimony, but it is not identified in any manner by the court, or certified to be any or all of the testimony in this case, and for that reason it cannot be legally considered. However, as the parties have printed in their briefs some excerpts therefrom, we have not refrained from looking into it. It shows, in substance, that switching is done daily at the "Y" in reversing engines and

trains for the branch line; but this of itself does not tend to make the "Y" or that part of the main track between it and Sumpter Siding a part of the depot grounds of Sumpter Station, three fourths of a mile distant, or that of itself it constituted a separate and distinct depot or station, within the limitations stated in *Wilmot v. O. R. & N. Co.* 48 Or. 494 (87 Pac. 528; 7 L. R. A., N. S., 202). Switching is not the principal thing that constitutes a depot, but is only an incident of it. In our judgment, the correct distinction is stated in an extended footnote to that case found in 7 L. R. A. (N. S.) 203, where it is said:

"A very clearly defined principle regulates this question—the principle of paramount public importance of the public good or convenience over private rights. Fence laws have been passed very generally in all parts of the country, compelling railroad companies to fence their tracks in order to protect individuals from injuries to their stock straying thereon. But at stations where the general public has a right of access, and the necessary transactions of the road require it, an exception either by express language in the statute or by construction of the courts has come to be made in almost every instance to the general obligation to fence, on the ground that the public right of access overrules the private right of protection. The question, then, of how far this exception to the obligation to fence extends, or, in other words, how far or what are station or depot grounds, is decided by determining how far the public convenience requires an open track."

There is no public convenience to be conserved at a place used exclusively for switching. The public has no right of access where no passengers get on or off the train or no freight is loaded and unloaded. There is a suggestion in the evidence, however, that sometimes freight billed to Sumpter is put off at this "Y" as an accommodation. But that fact cannot, as a matter of law, be said to be sufficient to create a general public right of access to defendant's tracks at that point, so as to excuse it from the duty of fencing. We are of the opinion, therefore, that the court could not, as a matter of law, declare the place where plaintiff's cows were killed to be a necessary part

of defendant's station at Sumpter, or part of an independent station at the "Y," so as to excuse it from the legal duty to fence its tracks.

It follows that the judgment must be affirmed.

• AFFIRMED.

Decided 7 January, 1908.

EUGENE v. LANE COUNTY.

98 Pac. 255.

MUNICIPAL CORPORATIONS—ASSESSMENT OF TAXES.

1. Where, under a city charter, taxes on property within the city, for road purposes within the city, should have been levied by the city, but the same were levied by the county, and the county collected them, as required by Section 3004, B. & O. Comp., and the taxes were voluntarily paid, the city was entitled to recover them from the county.

TAXATION—RECOVERY OF TAXES PAID.

2. Where a void tax is voluntarily paid, it cannot be recovered back.

MUNICIPAL TAXATION.

3. Under Section 3004, B. & O. Comp., where a county tax collector collects a void municipal tax and turns it over to the municipality, the remedy of the taxpayer (if he has saved his rights), is against the municipality, and not against the county; hence the county having collected a void city tax, voluntarily paid by the taxpayer, is not justified in refusing to pay it over.

From Lane: JAMES W. HAMILTON, Judge.

Statement by MR. JUSTICE EAKIN.

This is a proceeding brought by the plaintiff to review the action of the County Court of Lane County in disallowing its claim for road tax money collected by the county from the taxable property within the City of Eugene. The claim presented by the plaintiff against the county recites that the county court of said county did, on January 7, 1904, levy a tax against all taxable property in said county, including property within said City of Eugene, in which was computed for road purposes one mill on each dollar, which tax was computed on the assessment roll for the year 1903, and that the same levy was made for a similar purpose January 11, 1905, and computed on the tax roll for the year 1904, and again on January 6, 1906, computed on the tax roll for the year 1905, and that of the taxes so levied there was collected by the county and turned over

to its treasurer of the tax so computed for road purposes upon the taxable property within said City of Eugene, a total of \$5,-291.44, and that on the 16th day of June, 1906, the said county court, after consideration, disallowed said claim, and the plaintiff brought the said proceeding to the Circuit Court of the State of Oregon for Lane County by writ of review, and by it the writ was sustained, and the county court directed to allow the said claim with interest from June 16, 1906; and the county has brought the case to this court by appeal. **AFFIRMED.**

The case was submitted on briefs under the proviso of Rule 16: 35 Or. 587, 600.

For appellant there was a brief over the name of *Woodcock & Potter*.

For respondent there was a brief over the name of *Williams & Bean*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. The city charter of 1893 (Laws 1893, p. 564), in force at the time of the levy of January 7, 1904, and January 11, 1905, provided (Section 127) that the city shall constitute an independent road district, and for road purposes is expressly taken from the jurisdiction and control of the county court. The charter of 1905, in force at the time of the levy of January 6, 1906, by Section 114, which corresponds with Section 127 (page 595) of the charter of 1893, in taking from the county the jurisdiction over the territory within the City of Eugene for road purposes, also expressly takes away the power to levy taxes for road purposes, and road and poll taxes are by both charters given over to the control of the city, and the city is authorized to levy a road tax to be collected as other taxes. By Section 3098, B. & C. Comp., which has been in force since 1893, cities and school districts are required, after making their tax levy, to notify the county clerk thereof, and by Section 3094 the county clerk shall include such city and other tax levies with the county levy in extending the same upon the tax roll, and they shall be collected by the sheriff as other taxes are collected. It has been decided by this court, in *Salem v.*

Marion County, 25 Or. 449 (36 Pac. 163), and *Oregon City v. Clackamas County*, 32 Or. 491 (52 Pac. 310), that, where the county collects road taxes belonging to the city that should have been collected by the city officers, the county is required to pay over the same to the city, and this is conceded by defendant; but it is claimed that the case at bar does not come within the ruling in *Salem v. Marion County*, for the reason that the road tax levy in the latter case, even within the city, was properly made by the county court, but that it was the duty of the city's officers, and not the sheriff, to collect the tax. In this case, as well as in that, the county had no right or claim to the money. It properly belongs to the city. In *Salem v. Marion County*, 25 Or. 449 (36 Pac. 163), the tax was collected by the wrong officer, while in this case it was collected by the right officer, but the levy made by the wrong body; and the whole reliance by the defendant, to justify its refusal to pay the money over to the city, is that it is liable only to the taxpayers, and not to the city. However, if the levy was void and might have been resisted by the taxpayer, yet, when he has voluntarily paid it, he is precluded from questioning the regularity of the proceeding or the validity of the levy. It is held in *Brown v. School District*, 12 Or. 345 (7 Pac. 357), that the collection of a void tax may be enjoined, or payment thereof may be made under protest and the amount recovered back. But when once voluntarily paid by the taxpayer he is precluded from thereafter attacking its validity.

2. It is generally conceded that a tax voluntarily paid cannot be recovered back, and it is immaterial in such a case that the tax has been illegally levied. Before a taxpayer can recover it back, the tax must be illegal and the payment must have been made under compulsion: Cooley, *Taxation* (2 ed.), 805, 809. In *People ex rel. v. Brown*, 55 N. Y. 180, 187, where the validity of the tax was questioned by the collector, the court say:

"The defendant cannot claim to retain the money as the representative of the taxpayers. There is no relation of principal and agent, or trustee or *cestui que trust*, existing between

the taxpayers and the collector; and it does not appear but that it was paid by them voluntarily, and under circumstances which would prevent their recovering it back from any one."

Similar language was used in *Berrien County Treasurer v. Bunbury*, 45 Mich. 79, 85 (7 N. W. 704, 706):

"He received it in payment of taxes, and as money belonging to the public. Whose money is it? Those who were assessed voluntarily paid it in satisfaction of their tax dues and in the discharge of their duty as citizens. * * Can it be an answer to this suit brought for its recovery to say: * * But it could not have been obtained if the taxpayers who freely paid and do not complain had held back for compulsory measures? We think not."

See, also, *Lovington et al. v. Board of Trustees*, 99 Ill. 564; *O'Neal v. Board of School Com'rs*, 27 Md. 227. Cooley, Taxation, 705, says the collector "would not be permitted to rely upon technical objections which might be made to the right of the public to the money. If he receives the money to the use of the public, he should account for it; and it is immaterial that those who have paid it might successfully have resisted the collection from them. The principles here stated are applicable, not merely to the case of a defect in the official authority, but to the case, also, in which defects, either technical or substantial, might have been urged to the tax the officer has enforced."

In *Salem v. Marion County*, 25 Or. 449 (36 Pac. 163), it is said:

"The principle that an obligation rests upon all persons, natural and artificial, to do justice, so that, if a county obtain money or property of others without authority, the law, independent of any statute, will compel restitution or compensation, is not questioned."

3. By the terms of the statute above cited, the county is made the tax collector for cities and school districts, and it stands in that relation to them in all proceedings in relation thereto. If the county tax collector collects a void municipal tax and turns it over to the municipality, the remedy of the taxpayer, if he has saved his rights, is against the municipality,

and not against the collector: Cooley, Taxation, 805. The county's position is wholly untenable. It has levied a road tax within the city, evidently in good faith, believing that that was the method for raising road taxes for the city, but now says that the city, and not the county, should have made the levy, and that it will, therefore, keep the money, on the theory that the city has no title to it. Although it was the duty of the city to have levied the tax, the county court assumed to do so, and then collected it, as was its duty, if properly levied. The city, by its conduct in claiming the tax, has ratified the levy, and the taxpayer has voluntarily paid the tax; hence it is clear that the fund is the property of the city, and the county is not justified in refusing to pay it over.

The judgment of the lower court is affirmed. **AFFIRMED.**

Decided 21 January, rehearing denied 10 March, 1908.

STANLEY v. RACHOFSKY.

28 Pac. 354.

JUSTICES OF THE PEACE—SUMMONS—CONTENTS.

1. Laws 1905, p. 315, provides that a justice's summons shall require the defendant to appear and answer within seven days from the date of service, or suffer judgment for the sum specified in the complaint with the disbursements of the action, and Section 228, B. & O. Comp., provides that such summons shall be served by delivering a copy thereof, together with a certified copy of the complaint, etc. *Held*, that where a summons properly issued and signed contained sufficient information to warn defendant that a judicial proceeding was pending against him in a particular court, and that if he did not appear and answer, a judgment would be taken against him for a specified sum, it was not fatally defective for failure to state the rate of interest demanded and the date from which it was to be computed, such facts appearing from a copy of the complaint served with the summons.

SAME—IRREGULARITY IN PROCESS—SERVICE—REMEDY.

2. An irregularity in the process or in the manner of its service by which a justice's jurisdiction was acquired must be taken advantage of by some motion or proceeding in the court where the action is pending.

SAME—COPY OF SUMMONS—CERTIFICATION.

3. Where a return of service of a justice's summons certified that a copy was served, such return was sufficient proof that the instrument served was a copy under Section 228, B. & O. Comp., requiring only that a copy of the summons be served, and not requiring that it be certified by any one to be a copy.

SAME—TIME TO ANSWER.

4. Under Laws, 1905, p. 315, providing that a defendant in a justice's court shall be required to answer within seven days from the date of the service, he may answer on any one of those dates.

SAME—APPEARANCE—DOCKET ENTRY.

5. Laws 1905, p. 315, requires defendant in a justice's court to answer within seven days from the date of service, and Section 221, B. & O. Comp., provides that his plea or answer must be in writing and be filed with the justice. *Held*, that where a defendant in a justice's court could not have been in default until the date on which judgment was rendered, and was in default on the beginning of that day, and the judgment recited that defendant had failed to answer the complaint as required by law, such recital being in the form set forth on page 786, B. & O. Comp., was sufficient to sustain the judgment without a docket entry of defendant's failure to appear.

From Grant: GEORGE E. DAVIS, Judge.

Statement by MR. COMMISSIONER SLATER.

On February 12, 1907, Rachofsky & Son filed, in the justice's court for the Third Justice's District of Grant County, a complaint embracing two causes of action against plaintiff. On the first cause of action judgment was demanded for \$29.60, with interest at 6 per cent per annum from October 7, 1903, and on the second cause of action for the sum of \$20, with interest at the rate of 6 per cent from July 15, 1903, and for their costs and disbursements. The summons was issued on February 12, and required the defendant in the action to appear and answer the complaint within 7 days from the date of the service thereof, or suffer judgment to be taken against him for the sum of \$49.60, with interest thereon, with the disbursements of the action. It was returned and filed with the justice on the 21st, with an indorsement thereon showing personal service on February 13, in Grant County, Oregon, on defendant, by a delivery to him of a copy thereof prepared and certified by the deputy sheriff, together with a copy of the complaint certified to be such by plaintiff's attorney. After the issuance of the summons, no entry was made by the justice in his docket that in any way referred to the date of the making or filing of any pleading by the defendant, or of his appearance or failure to appear in the action until the 21st, when the following entry was made: "Plaintiff appeared, and it appearing that the defendant has failed to answer the complaint as required by law,

it is considered that the plaintiff recover off the defendant the sum of \$59.89, and the disbursements of the action, taxed at \$13.90." On March 4, 1907, plaintiff herein sued out a writ of review to set aside and annul such judgment on the ground (1) that no summons was issued as required by law; (2) that there was no service upon the petitioner of the pretended summons; (3) that the justice did not enter in his docket the failure of the defendant to appear; (4) that it does not appear from the judgment as entered in the justice's docket that the defendant therein was ever served with a summons in said action, or that he was served more than seven days prior to the rendition of the judgment; and (5) that the amount for which it was entered does not conform it to the amount specified in the summons, for which judgment would be taken in default of an answer. The lower court set aside the judgment, and Rachofsky & Son appeal.

REVERSED.

For appellant there was a brief with oral argument by *Mr. A. M. F. Kirchheiner*.

For respondent there was a brief with oral arguments by *Mr. Errett Hicks* and *Mr. J. E. Marks*.

Opinion by MR. COMMISSIONER SLATER.

1. The only deficiency in the summons urged as a reason for overturning the judgment is that, although there is given the amount of the principal of the debt for which judgment is demanded, it fails to state the rate of interest demanded, and the date or dates from which it was to be computed. At the time of the commencement of the action, the law governing trials and proceedings in civil actions in justices' courts provided that the summons "shall require the defendant to appear and answer the complaint within seven days from the date of the service thereof upon him or suffer judgment to be taken against him for the sum specified in the complaint, with the disbursements of the action" (Laws 1905, p. 315), and that it shall be served by delivering a copy thereof, together with a certified copy of the complaint, etc.: Section 2203, B. & C. Comp. While

it is advisable in the issuance of the summons that the statute should be literally complied with, nothing short of a substantial departure therefrom can properly be held to be fatal to a proceeding under it, and the recent decisions are to the effect that a substantial compliance with statutes of this character is all that is required: *Higley v. Pollock*, 21 Nev. 198 (27 Pac. 895); *Bewick v. Muir*, 83 Cal. 368 (23 Pac. 389); *Clark v. Palmer*, 90 Cal. 504 (27 Pac. 375); *Bucklin v. Strickler*, 32 Neb. 602 (49 N. W. 371); *McPherson v. First Nat. Bank*, 12 Neb. 202 (10 N. W. 707); *Keybers v. McComber*, 67 Cal. 395 (7 Pac. 838); *Shinn v. Cummins*, 65 Cal. 97 (3 Pac. 133); *White v. Iltis*, 24 Minn. 43; *Kimball v. Castagnio*, 8 Colo. 525 (9 Pac. 488); *Warren v. Gordon*, 10 Wis. 499; *Behlow v. Shorb*, 91 Cal. 141 (27 Pac. 546). Doubtless the summons was slightly irregular or defective in the respect mentioned, but it was nevertheless issued and signed by the proper officer, and contained information sufficient to warn the defendant that a judicial proceeding was pending against him in a particular court, and that if he did not appear therein and answer the complaint within a specified time, a judgment would be taken against him for a certain sum of money. Upon proper service of such a summons a judgment given for want of an answer would not be void: *North Pacific Cycle Co. v. Thomas*, 26 Or. 381 (38 Pac. 307; 46 Am. St. Rep. 636); *Perry v. Gholson*, 39 Or. 438 (65 Pac. 601; 87 Am. St. Rep. 685). The deficiency in the summons is no more than an irregularity, and such a one as does not affect a substantial right of the defendant, when, as in this case, a copy of the complaint was served with the summons.

2. The relief demanded in the complaint is full and explicit, and carried notice to the defendant of all the facts of which he says the summons was lacking.

"But if the complaint is served with the summons," says Mr. Justice ALLEN, in *McCoun v. Railroad Co.* 50 N. Y. 176, "the defendant has more full and perfect knowledge of the cause of action and the consequences of default than he could get from the summons alone, and if there is an error or defect in the sum-

mons, it carried with it the remedy and correction, and an effectual preventive against error by any one."

Also, if there is any irregularity in the process or in the manner of its service, the defendant must take advantage of such irregularity by some motion or proceeding in the court where the action is pending: 1 Freeman, Judgments (4 ed.), § 126.

3. The second reason assigned in support of the petition is that there was no legal service of the summons on the petitioner, but the return of the officer successfully disproves that averment. It is particularly urged in this connection that, because the copy of the summons delivered to the defendant was certified to by the deputy sheriff instead of the sheriff, it amounted to no service. The statute, however, required only that a copy of the summons be served, and does not require that it shall be certified by any one to be a copy: Section 2203, B. & C. Comp.; *Bank v. Richardson*, 34 Or. 518 (54 Pac. 359; 75 Am. St. Rep. 664). The return shows that a copy was served, and that is sufficient proof that it was a copy.

4. As a further reason for overturning the judgment, it is averred that the justice did not enter in his docket the failure of the defendant to appear as required by Section 2198, subd. 4. B. & C. Comp. Plaintiff relies solely upon the decision of this court in the case of *Loan Ass'n v. Osburn*, 38 Or. 568 (64 Pac. 383), to support that contention. It was there held that there must be a substantial compliance with the requirement of that section to authorize the entry of a judgment by default which will not be subject to direct attack. But the state of the law of procedure and practice in justices' courts in civil actions at the time of the commencement of that case is radically different from what it is now. At that time the summons required the defendant to appear at a specified time to answer the complaint, so that he could not appear or answer at any other time, so, also, no formal or written pleadings were required, but they may have been either oral or written (Laws 1893, p. 38), while at the time of the commencement of the present action the defendant is required to answer within seven days from the date of the

service, and he may, therefore, answer on any one of those days: Laws 1905, p. 315.

5. And his plea or answer must be in writing and be filed with the justice: Section 2211, B. & C. Comp. It is also material to note that subdivision 4 of Section 2198, B. & C. Comp., requiring the justice to enter in his docket the time when the parties appeared or their failure to do so, is a part of the original justices' act of 1864, which recognized an oral pleading. Under such practice the personal appearance of a party and the making of an oral plea could not be evidenced in any other manner than by an entry in the docket of that fact. While the absence of such an entry might have been sufficient proof that no appearance was made, yet the legislature saw fit to enact that the failure of a party to appear should also be entered. But it did not provide that a failure to file a written plea should be noted by the justice. It is stated in *Hardy v. Miller*, 11 Neb. 395 (9 N. W. 475), cited in *Loan Ass'n v. Osburn*, 38 Or. 568 (64 Pac. 383), that:

"The finding of a court that Hardy and wife made 'default of answer' is one of fact. No judgment can lawfully be rendered by default until the time for filing an answer has elapsed, and the authority of the court to render such judgment follows from the failure of the defendant to answer, and not from the particular manner in which the default entered. The essential fact is the failure to answer."

The deduction made from this case by Mr. Chief Justice BEAN, in the case of *Loan Ass'n v. Osburn*, 38 Or. 568 (64 Pac. 383), as applied to the law as it was then, is that "where a record shows that the court convened at the time and place specified in the summons, and after waiting the statutory time a judgment was rendered against a defendant for want of an answer, it will perhaps be sufficient, although no formal default was entered, as the record actually made is practically equivalent thereto." In the case now under review the defendant could not have been in default until February 21, and he was in default at the beginning of that day on which judgment was entered. Prior to the 21st no entry or record of the defend-

ant's failure to appear and answer the complaint could have been made. When the recitals of the judgment embodied in the record show that in fact the defendant was in default, it is sufficient to authorize the action of the court, and the judgment will be sustained on appeal or error: 6 Pl. & Pr. 56. The judgment recites "that the defendant has failed to answer the complaint as required by law." This is a conclusion, it is true, but one that the court is bound to draw from the state of the record, because there is no entry therein of the filing of any pleading by defendant, and that is sufficient in itself to contravene the assumption that one may have been filed. Under the present state of the law, the recital is sufficient to support a default, especially so since the forms of the docket entries used by the justice in this instance are precisely those set forth in page 786, B. & C. Comp., for the guidance of such courts.

The remaining averments of the petition do not appear to have been relied upon, and we think are without merit. The judgment should be reversed and the cause remanded, with directions to dismiss the writ.

REVERSED.

Decided 21 January, 1908.

MILLER v. ACHURCH.

83 Pac. 832.

EXECUTION SALE—SETTING ASIDE—ACQUIESCENCE.

1. Parties acquiescing in the action of the court in setting aside an execution sale and ordering a resale are bound thereby.

SAME—PERSONS WHO MAY QUESTION VALIDITY OF SALE.

2. At common law the confirmation of a sale on execution might be objected to and the same set aside by plaintiff, defendant, or the purchaser.

SAME.

3. Under Section 212, Subd. 1, B. & C. Comp., providing that plaintiff in execution shall be entitled to an order confirming a sale thereunder, unless the judgment debtor or his representatives shall file objections, does not deprive any other interested person than the debtor of the right to object who by common law possessed that right; and hence plaintiff may object.

SAME—RESALE—STATUTORY PROVISIONS.

4. The mere fact that plaintiff in execution refused to receipt to the sheriff for the amount of his bid, or to credit his judgment, would not of itself be evidence of an abandonment or withdrawal of his bid, so that there would be in law no sale to him within Section 212, Subd. 1, B. & C. Comp., providing that on

a resale, the purchaser's bid at the former sale shall be deemed renewed and to continue in force, and no bid shall be taken except for a greater amount.

SAME—NO RIGHT TO WITHDRAW BID ON EXECUTION SALE.

5. Property having been struck off to plaintiff in execution, he had no right to withdraw his bid, and could be excused only by an order of the court, and, if the sale was considered by the court regular, it had the power to enforce the same, and cancel the judgment *pro tanto*, notwithstanding plaintiff's refusal to receipt to the sheriff.

SAME—RESALE—FORMER BID RENEWED.

6. Under Section 242, Subd. 1, B. & O. Comp., providing that on a resale on execution the purchaser's bid at the former sale shall be deemed renewed, and no bid shall be taken except for a greater amount, and by subdivision 3, providing for a repayment to the former purchaser, if the property sell for a greater amount to another, where the court in ordering a resale did not include therein any release of plaintiff in execution from his bid, he continued to be bound by it, and the sheriff was bound to consider it as renewed.

From Wallowa: WILLIAM SMITH, Judge.

Statement by MR. COMMISSIONER SLATER.

On July 23, 1906, plaintiff obtained a judgment against Achurch & Hammack for the aggregate sum of \$2,933.40, besides costs and disbursements, and a decree for the foreclosure of a mortgage lien upon some town lots to pay the judgment. Defendant, First Bank of Joseph, also obtained judgment in the same suit against Hammack and wife for the aggregate amount of \$265, which was adjudged to be a second lien and to be paid out of the proceeds of the sale of the property, which was ordered to be made. Execution issued, and on September 25, 1906, a sale took place at which the plaintiff bid \$2,500 for the property, and the same was struck off to him. A return to that effect was made and filed October 6, 1906, from which it appears, after reciting the fact of the sale, that "Miller after bidding said above named sum refused to pay over the money so bidden for said real property and refused to credit the above named sum so bidden on the judgment and execution herein, and has since continued to refuse and neglect to pay over said sum or credit said judgment therewith."

Afterwards, on the 27th of October, the sale was set aside on plaintiff's motion, a new execution ordered issued, and the property resold, and the costs thereof charged to plaintiff. At the second sale, plaintiff not appearing, the property was struck off to George Mack for the sum of \$1,500, and a return to that

effect was made and filed December 12, 1906. Defendant, First Bank of Joseph, moved for confirmation of the sale, but on May 14, 1907, plaintiff filed his objections to confirmation of the sale, and moved that it be set aside, on the ground that the property had been sold for \$1,000 less than his bid at the former sale, contrary to the provisions of Section 242, subd. 4, B. & C. Comp. An order was made overruling the objections and denying plaintiff's motion, and confirming the sale, from which he appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Charles E. Cochran*.

For respondent there was a brief and an oral argument by *Mr. Charles H. Finn*.

Opinion by MR. COMMISSIONER SLATER.

1. The reason which moved the court to set aside the first sale does not appear in the record, nor is it material that it should, for the action of the court in setting aside the sale was not questioned by any person interested, and it became legally binding on all parties who acquiesced. If plaintiff has a right to be heard on his motion at all, it seems to us that this second sale must be set aside as a result of the positive declaration of the statute that "upon a resale, the bid of the purchaser at the former sale shall be deemed to be renewed and continue in force, and no bid shall be taken except for a greater amount": Section 242, subd. 4, B. & C. Comp.

The question presented by the record is not inadequacy of price alone, but the legal effect of the act of the sheriff in refusing to recognize plaintiff's former bid as renewed and continuing in force, and accepting another bid of a smaller amount. If one is the highest bidder, and the officer fraudulently refuses to recognize his bid and reports the property sold on a different bid, he is entitled to have the sale vacated: *Freeman*, Ex. p. 1787. It is argued by defendants' counsel that plaintiff cannot be heard to object to the confirmation of the sale, for two reasons, namely: (1) That by the terms of Section 242, subd. 1, B. & C. Comp., no one but the judgment debtor, or, in case

of his death, his representative, may object to the confirmation; and (2) that there was in law no sale to plaintiff under the first execution, but that by refusing either to receipt to the sheriff for the amount of his bid or credit his judgment, plaintiff abandoned his bid and thereby withdrew it.

2. The first of these questions involves the proper construction of the statute. Where the procedure to secure the confirmation of a sale on execution has not been regulated by statute, it has been uniformly held that plaintiff, defendant or the purchaser is entitled to prosecute a motion or action to set aside a sale, because each of them may be aggrieved thereby, unless from some cause he has ceased to be prejudiced or affected by it, or by his own misconduct he has brought about the wrong of which he complains. Thus a purchaser may move to vacate a sale because the proceedings are not sufficient to give him title, or for any other reason rendering it unconscionable to enforce his bid, and the plaintiff may likewise do the same because some irregularity, misconduct, mistake or misapprehension has resulted in a sale for an inadequate price, leaving his judgment wholly or partially unsatisfied: 2 Freeman on Ex. § 305; *Beckwith v. Mining Co.* 87 N. C. 155.

3. And in *Flint v. Phipps*, 20 Or. 340 (25 Pac. 725: 23 Am. St. Rep. 124), Mr. Chief Justice STRAHAN delivering the opinion, this court announced the general rule that "courts always exercise full control over their process, so that suitors shall not be prejudiced either in the form of the writ or the manner of its execution"—citing *McKee v. Logan*, 82 Mo. 524. Has the statute in question then taken from plaintiff the right, which he would otherwise possess, to object to the confirmation of a sale, and has the statutory power, which courts have been accustomed to exercise over their process so that suitors shall not be prejudiced either by the form of the writ or by the manner of its execution, been so limited by this statute that it cannot be exercised except upon objections by the judgment debtor or in case of his death by his legal representative? The statute referred to is as follows:

"Whenever real property is sold on execution the provisions of this section shall apply to the subsequent proceedings: (1) The plaintiff in the writ of execution shall be entitled, on motion therefor, to have an order confirming the sale, at the term next following the return of the execution, or if it be returned in term time, then at such term, unless the judgment debtor, or in case of his death, his representative, shall file with the clerk 10 days before such term, or if the writ be returned in term time then 5 days after the return thereof, his objections thereto": Section 242, subd. 1, B. & C. Comp.

The purpose of this statute, as we read it, is not to prescribe how and under what circumstances a sale may be confirmed, excluding all others, but the plain intendment of it is to fix a time before which confirmation may not be taken by the plaintiff, and to preserve to the judgment debtor or to his legal representative a reasonable time in which he may object, and, in case he does not object within the time therein specified, he shall be deemed foreclosed of that right. The statute expressly recognizes the right of plaintiff to move for confirmation and of the judgment debtor to object, but there is no language therein which by reasonable intendment can be construed to deprive any other interested person than the plaintiff of the right to move for confirmation, who by common law possessed that right, nor to deprive any other interested person than the judgment debtor of the right to object at any time before confirmation. Upon this view of the law plaintiff had the right to present his objections and have the facts determined.

4. The second point urged by defendants is also insufficient, we think, to deprive plaintiff of the relief he seeks. The mere fact that he refused to receipt to the sheriff for the amount of his bid or to credit his judgment would not of itself be evidence of an abandonment or a withdrawal of his bid. That would be determined by the reason for his refusal. If the proceedings had been so irregular as not to give him a title, or if by an excusable mistake he had inadvertently bid a sum less than the amount of his execution (*Ontario Bank v. Lansing*, 2 Wend., N. Y., 260), he then had sufficient reason to cause the sale to be set aside, and, having knowledge of such facts, he could not

receipt or credit his judgment without waiving the right to object to confirmation.

5. Moreover, the property having been struck off to him, he had no right to withdraw his bid, and could be excused only by an order of the court: 2 Freeman, Ex. § 300. If the sale had been considered by the court fair and regular, it had the power to enforce the sale and cancel the judgment *pro tanto*, notwithstanding plaintiff's refusal to receipt. These matters were heard and passed upon by the court, and it ordered a resale. The parties acquiesced, and its decision cannot now be questioned by this court.

6. At common law an order for a resale released the purchaser from his bid and entitled him to a return of his deposit (Freeman, Ex. § 304), but Section 242, subd. 4, B. & C. Comp., provides that "Upon a resale, the bid of the purchaser at the former sale shall be deemed to be renewed and continue in force and no bid shall be taken except for a greater amount"; and subdivision 3 of the same section provides for a repayment to the former purchaser the amount of his bid if the property sell for a greater amount to any other person. The court in ordering a resale did not include therein any release of the plaintiff from his bid, and he continued, therefore, to be bound by it. Hence the sheriff could not ignore it, but he was bound to consider it as renewed.

From these considerations, the order of the court appealed from should be reversed, and the cause remanded, with directions to set aside the sale and order a resale. REVERSED.

Decided 21 January, rehearing denied 31 March, 1908.

JENNINGS v. LENTZ.

93 Pac. 327.

ATTACHMENT—ATTACHING CREDITOR—BONA FIDE PURCHASER.

1. Section 302, B. & C. Comp., provides that from the date of an attachment until it is discharged, or the writ is executed, plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration, provided the sheriff's certificate required by section 301 is filed as required by section 303. *Held*, that an attaching creditor, in order to obtain the rights of a *bona fide* purchaser, is bound to prove that he in fact acquired his lien in good faith and without notice of outstanding equities.

ORDINARY PRUDENCE IN MAKING PURCHASES—"GOOD FAITH."

2. Good faith is an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all belief of facts which would render the transaction unconscientious. A want of that caution and diligence which an honest man of ordinary prudence is accustomed to exercise in making purchases is, in judgment of law, a want of good faith.

VENDOR AND PURCHASER—NOTICE.

3. Whatever is sufficient to put a subsequent purchaser on inquiry must be considered legal notice to him of the facts inquiry would have disclosed by the exercise of reasonable diligence.

ATTACHMENT—ATTACHING CREDITORS—NOTICE—RECORDS.

4. Sections 800-808, 5359, B. & O. Comp., provide that nonexempt real estate shall be liable to attachment by the sheriff making a certificate and filing the same with the clerk of the county in which the property is situated, and that from the date thereof the plaintiff, as against third persons, shall be a purchaser in good faith, and that every conveyance of real property within the State which shall not be recorded within five days after its execution shall be void as against a subsequent *bona fide* purchaser whose conveyance shall be first recorded. L. having sold certain land to D. for a consideration, half of which was secured by a mortgage thereon, D. within an hour conveyed the property to G., who conveyed it to complainants' grantors. The mortgage to L. was recorded, but the deed to D. was not, and defendant, relying on a statement by L. that he had conveyed the land to D., attached it for D.'s debt, after which the deeds to D. and complainants were recorded. *Held*, that L.'s statement that he had conveyed the land to D. was rebutted by the record which showed that the title still remained in L., which record only gave notice of the facts therein stated and warned defendant to make further inquiries as to D.'s title to the premises, so that he was not a *bona fide* purchaser under his attachment, entitled to priority against complainants.

From Baker: WILLIAM SMITH, Judge.

Suit to remove a cloud upon the title to 160 acres of land in Baker County. The defendant appeals from a decree in favor of plaintiff.

AFFIRMED.

MR. JUSTICE EAKIN and MR. COMMISSIONER SLATER dissenting.

For appellant there was a brief over the name of *Mr. Charles A. Johns*, with an oral argument by *Mr. Woodson L. Patterson*.

For respondent there was a brief over the names of *C. E. Norton* and *C. P. Murphy*, with an oral argument by *Mr. Murphy*.

Opinion by MR. COMMISSIONER KING.

This is a suit to remove a cloud upon the title to 160 acres of land in Baker County, and is brought here on an appeal from a decree of the circuit court in favor of plaintiffs. On and prior

to April 23, 1902, the land was owned and in the actual possession of Frank Lentz. On the date named, in consideration of \$500, one half of which was paid in cash and the balance by a note due one year after date, secured by a mortgage on the property, he executed a warranty deed to the premises to Robert Duvall, who, within an hour after receipt of the conveyance, and without entering into possession, executed a like deed therefor to Mary E. Gardner, who had furnished the money for the purchase, and for whom, without the grantor's knowledge, Duvall was acting as agent in the purchase from Lentz. On the same day that the deed to Duvall was executed, Lentz recorded his mortgage in the proper records of that county, and soon thereafter removed from the land, leaving no one in possession, and, so far as manifested by the evidence, no one was in actual possession of the land when this suit was filed. The deed to Gardner was given subject to the Lentz mortgage. which, with the deed from Lentz to Duvall was left by Mrs. Gardner with M. S. Hughes, who was to take them to the clerk's office for record; but for some unexplained reason they were not recorded until 30 days later. On October 3, 1903, Mrs. Gardner, by warranty deed and for a valuable consideration, transferred the property to plaintiffs' grantors, who, by like deed, conveyed it to plaintiffs. Shortly after Frank Lentz had deeded the property to Duvall he informed the defendant of the transfer, to whom it appears Duvall was indebted in the sum of \$145, which indebtedness was incurred some time prior to the transfer of the property by Lentz. Defendant then had his attorneys examine the records of the county for the purpose of ascertaining if the debtor still owned the property, which resulted in their finding a record of the mortgage on the property from him to Frank Lentz, but the record title to the land in the mortgagee. Without further information than the statement by Frank Lentz to the effect that on April 23d he had conveyed the land to Duvall, and the record of the mortgage named, the defendant, on May 7, 1902, caused the land to be attached in an action filed against Duvall on the \$145 claim, in which proceeding judgment was obtained, execution issued thereon,

and the property sold to satisfy the judgment, which property was purchased by defendant, he receiving a sheriff's deed therefor, through which he here claims title.

There is no controversy as to the facts, leaving for adjudication the question as to which has the better title under the facts as stated.

1. Our statute provides that any real property of the debtor not exempt from execution shall be liable to attachment, which shall be attached by the sheriff making a certificate containing the title of the cause, names of the parties and description of the realty, with a statement showing the property to have been attached, and filing the same with the clerk of the county in which the property is situated; that from the date thereof until discharged, or writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith for a valuable consideration; that his rights as such shall attach immediately upon the filing of such certificate; and that every conveyance of real property within this State which shall not be recorded within five days after the execution thereof shall be void as against any subsequent purchaser in good faith for a valuable consideration, whose conveyance thereof shall be first duly recorded: B. & C. Comp. §§ 300-303, 5359.

2. In order, therefore, to determine whether defendant's title is superior to that of plaintiffs, it is necessary to ascertain only whether, in lieu of the course pursued, he would have been a purchaser in good faith, if with the limited knowledge of the status of Duvall's title at the time of the levy, defendant had purchased the property from him and paid a valuable consideration therefor. If answered in the affirmative, he has the better title and must prevail; otherwise plaintiffs have the superior title, and are entitled to the relief demanded. Under the law as it existed prior to the adoption of the statute mentioned, to the effect that after the filing of the attachment proceedings the creditor shall be deemed a purchaser in good faith, the creditor, by virtue of his attachment, acquired a lien only on the actual interest which the debtor had in the property: *Riddle v. Miller*, 19 Or. 468 (23 Pac. 807). It is obvious that

the statute on this point was intended to modify this rule, and to give the attaching creditor, regardless of the actual condition of the debtor's title, additional protection by placing him in the same position as a *bona fide* purchaser for value, in case of failure on the part of the real owner to observe the requirements of the recording acts. But, in construing these acts, it has been repeatedly held, and has become a settled rule in this State, that an attaching creditor, although placed on an equality with a purchaser by this statute, cannot insist on any greater protection than would be granted to such purchaser; and, in suits in equity, the claim of a *bona fide* purchaser for value is an affirmative defense, which must be pleaded, thereby placing the burden of proof in such cases upon the party relying thereon: *Weber v. Rothchild*, 15 Or. 385 (15 Pac. 650; 3 Am. St. Rep. 162); *Wood v. Rayburn*, 18 Or. 3 (22 Pac. 521); *Rhodes v. McGarry*, 19 Or. 222 (23 Pac. 971); *Marks v. Miller*, 21 Or. 317 (28 Pac. 14; 14 L. R. A. 190); *Simpkins v. Windsor*, 21 Or. 382 (28 Pac. 72); *Dimmick v. Rosenfeld*, 34 Or. 101 (55 Pac. 100); *Flegel v. Koss*, 47 Or. 366 (83 Pac. 847); *Haines v. Connell*, 48 Or. 469 (87 Pac. 265, 88 Pac. 872). In discussing this feature, Mr. Chief Justice THAYER, in *Rhodes v. McGarry*, 19 Or. 222 (23 Pac. 971), observes:

"It seems to me that, notwithstanding the language of the code above set out, an attaching creditor, in order to be deemed a purchaser in good faith of the property as against one having an outstanding equity, must allege and prove all the facts necessary to establish that character of ownership in favor of a purchaser of such property as against such an equity. It can hardly be supposed that the legislature intended, by the provision of the code referred to, to place an attaching creditor upon any more favorable grounds, with reference to his rights in the property attached, than those occupied by a purchaser of the property; nor to deem the former a purchaser in good faith, except under the same circumstances in which the latter would be deemed such a purchaser. Any other view would lead to absurd consequences and occasion injustice. It would enable a party to cut off an outstanding equity by resorting to an attachment when he would not be able to accomplish it by a direct purchase of the property. Such a result was obviously

not contemplated by the adoption of the said provision of the code."

As the answer is sufficient to bring the defendant's position within the rule announced, it becomes necessary to determine whether this plea is sufficiently supported by the evidence to entitle defendant to be deemed a purchaser in good faith. Words & Phrases (vol. 4, p. 3117) defines "good faith" as being "an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious." And the rule is that "a want of that caution and diligence which an honest man of ordinary prudence is accustomed to exercise in making purchases is, in judgment of law, a want of good faith": Words & Phrases, vol. 4, p. 3117.

3. Whatever is sufficient to put a subsequent purchaser on inquiry must be considered legal notice to him of those rights, and when the purchaser omits to observe that ordinary precaution, he must be charged with a knowledge of all facts he might have learned by the exercise of reasonable diligence in making inquiry as to matters to which his attention had been directed: *Dembitz, Land Titles*, §§ 132, 133; *Bent v. Coleman*, 89 Ill. 364; *Citizens' Nat. Bank v. Dayton*, 116 Ill. 257 (4 N. E. 492); *Pringle v. Phillips*, 5 Sandf. (N. Y. Sup. Ct.), 165.

The precise question, as here presented, is before this court for the first time, and we are referred to no case in which the point under a similar state of facts as here disclosed has been distinctly passed upon, nor have we found one, but an application of the principles stated are decisive of the issues presented. The result hinges upon the sufficiency of the inquiry made in reference to the debtor's rights in the premises. In this connection it is urged that the mortgage from the debtor to his grantor, being of record, when considered with the grantor's statement to the creditor to the effect that he had conveyed the property to the debtor on a prior date, without further inquiry, constituted sufficient evidence of the debtor's ownership therein to justify the attachment. It will be remembered, however, that

the record at the same time disclosed the title to the property to be in Frank Lentz. When, therefore, it is made to appear from the record that the title is in a person other than the debtor, the record of a mortgage on the land, given by such debtor, is not notice, or satisfactory evidence, that he is the owner of the premises mortgaged. A public record does not give notice of any facts not stated in it, or of facts that a person would not expect in the ordinary course of business to be found there. A person in the ordinary course of business affairs would not have expected to find a mortgage of record given by Duvall, unless he also appeared by the records to be the owner of the property mortgaged. From this it follows that, when the record disclosed the title to be in Lentz, the record of a mortgage given to him by Duvall did not constitute notice or evidence that the latter was the owner of the mortgaged premises: *Webb*, Record Title, §§ 158, 160; *Security Trust Co. v. Lowenberg*, 38 Or. 159 (62 Pac. 647); *Roberts v. Bourne*, 23 Me. 165 (39 Am. Dec. 614); *Pierce v. Odlin*, 27 Me. 341; *Losey v. Simpson*, 11 N. J. Eq. 246; *Bingham v. Kirkland*, 34 N. J. Eq. 229; *Calder v. Chapman*, 52 Pa. St. 359 (91 Am. Dec. 163); *Doswell v. Buchanan*, 3 Leigh, 365 (23 Am. Dec. 280).

4. The statement by Frank Lentz that he had conveyed the land to Duvall was rebutted by the record itself showing the title still to be in the person making the statement. The record of the mortgage was not only inadequate for the purpose claimed, but even if considered in connection with defendant's inquiry from Duvall's grantor, it cannot be held sufficient, in the absence of further investigation, to impart such notice as "an honest man of ordinary prudence is accustomed to act upon," when making a purchase of real property; and if not such as would be deemed sufficient for an actual purchaser, it must be conceded under the adjudications of this State, that it is insufficient to protect the defendant as an attaching creditor. As stated in *Bent v. Coleman*, 89 Ill. 364, 368:

"A person about to purchase this tract of land would naturally inquire into the title of the vendor. He would ascertain

his source of title. This is the ordinary, and usually the first, inquiry."

It appears that Duvall was known to be in the vicinity of the land when the attachment was made, and had defendant intended to purchase the land outright, it would have been his duty to ascertain, and he would probably have endeavored to learn, whether he had any title to convey. Had this been done, it is presumed he would have been told the truth, resulting in no purchase having been made; and, if made, defendant, under such circumstances, would have taken nothing under his deed as against Duvall's successors in interest. He could not, under such circumstances, have been a purchaser in good faith; and, as stated, he can be in no better position as an attaching creditor. When defendant was informed of the sale to Duvall, and that he became the owner, it had reference only to his ownership on April 23d, which was prior to the attachment, and it did not necessarily follow that the title was in him at the time of the levy; nor does it appear that defendant was in any manner informed that his debtor either was, or claimed to be, the owner at that time, and, finding the record evidence of title in the debtor's supposed grantor, this was sufficient to put him on inquiry, and made it imperative that he should make further investigation before acting, or else assume the risk of Duvall having no title. "It was not incumbent on him to exhaust every possible source of information" (*Johnson v. Erlandson*, 14 N. D. 518: 105 N. W. 722), but it was his duty to use at least reasonable diligence in that respect, or, in the event of his failure to do so, to abide the consequences. When he examined the records, and, in place of finding the title in the debtor, found it in a third party, he was in a far different position than that of a person attaching property on a claim against one who, under the records, holds the apparent title; for Duvall, when the levy was made, had neither the apparent nor the actual title. In the case of *Davis v. Lutkiewicz*, 72 Iowa, 254 (32 N. W. 670), to which our attention is directed, the grantor had the deed in his possession, which the court held was better evidence of title than a record thereof, as the record would have

imparted no notice not disclosed by the original deed, and when the person holding and exhibiting such instrument represented himself to be the owner of the property, the purchaser had such evidence of title as to justify him in acting accordingly. In this respect the case mentioned is very different from the one under consideration, in which the debtor had neither the actual title, nor any evidence thereof; nor does it appear that he claimed to be the owner of the land, nor that, after discovering the status of the title of record, any effort was made to ascertain from any one likely to be in possession of the desired information, whether at the time of the levy the debtor either was, in fact, or claimed to be, such owner.

After a careful consideration of the facts disclosed by the record, and of what we deem the principles of law applicable thereto, as announced and recognized by previous decisions of this court, we are impelled to hold that plaintiffs have the better title, on the ground that, when the records of the clerk's office of the county in which the land may be situated fail to show any title in the debtor, but disclose it to be in another, and the title in fact is not in such debtor, and the extrinsic evidence at hand is insufficient to warrant the creditor in acting on the theory of the debtor being the owner thereof, such attaching creditor must abide the risk incurred by his levy, and take only "what accident throws into his net as he finds it, and he cannot claim the benefit of a fiction to get more than his debtor really owned": *Cowley v. McLaughlin*, 141 Mass. 181, 182 (4 N. E. 821). See, also, *Haynes v. Jones*, 5 Metc. (Mass.), 292; *Hamilton-Brown Shoe Co. v. Lewis*, 7 Tex. Civ. App. 509 (28 S. W. 101).

The decree of the court below should accordingly be affirmed.

AFFIRMED.

MR. JUSTICE EAKIN delivered the dissenting opinion.

I am unable to concur in the foregoing opinion. The real point upon which the decision turns, is that the purchaser from a grantee whose deed is not recorded is, by reason of that fact alone, put upon inquiry, and consequently charged with notice

of the prior unrecorded conveyance from such grantee, and I refer to the rights of the attaching creditor as those of a *bona fide* purchaser for value without notice, as that is what the statute says he shall be deemed. It is conceded that if the grantee's deed is on record, a purchaser from him is not put upon inquiry or notice of a prior unrecorded deed. He takes a good title, if in fact ignorant of it. There are many cases where there can be no record of one's title, such as title by descent or by adverse possession, but that fact cannot prejudice one's right to purchase or attach. I dare say that it is an everyday occurrence that purchases are made from grantees who have not yet had their deeds recorded. In such a case the purchaser is bound to search the record for a conveyance from the apparent owner, as disclosed by the record, as well as from his own vendor, but the fact that his vendor's deed is not recorded cannot put him upon any other inquiry, or charge him with notice of any other facts. Section 5359, B. & C. Comp., provides that:

"Every conveyance of real property within this State hereafter made, which shall not be recorded as provided in this title, within five days thereafter, shall be void against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded."

From this it seems clear that the recording statute has no reference to the title acquired by the purchaser from one whose deed is not recorded, but affects the title only of him who fails to record his deed until a prior deed from his grantor, of which he had no notice, is recorded. The statute contains no suggestion or imputation that one can purchase only from him who appears, from the record, to be the owner, or if he does so, it is at his peril. The effect of the opinion in the case is that, if one purchases from a person who is not disclosed by the record to be the owner, he gets only such title as his grantor actually has at the time of the purchase, regardless of the provisions of the recording statute. This is the holding in *Flynt v. Arnold*, 2 Mete. (Mass.), 619. The effect of our statute (B. & C. Comp.

§§ 302, 5359), is that the attachment can reach the actual interest had in the property by the debtor at the time of the attachment, and as to this remedy the registration laws have no application whatever, and the attachment can reach only such interest, except that in case of a prior conveyance by the debtor such conveyance will be deemed void if it is unrecorded and the creditor is without notice of its existence, and in that case the attachment will be effectual as though said deed had not been made, and the recording statute, by its terms or intentment, applies only to such unrecorded instrument. In the case of *Davis v. Lutkiewicz*, 72 Iowa, 254 (33 N. W. 670), it is said:

"An unrecorded deed is valid as to the whole world, except a subsequent purchaser for a valuable consideration without notice. Surely the deed itself is better evidence of title in the grantee than the record of the deed. This deed the mortgagor had and held when Davis & Sons took their mortgage. A record of it would have imparted no notice not imparted by the original instrument."

The court, further speaking of the case of *Flynt v. Arnold*, 2 Metc. (Mass.), 619, which holds that "one who purchases land from a person holding an unrecorded deed purchases at his peril," says:

"But this proposition cannot be sustained, because, under our registry laws, the holder of an unrecorded deed has a complete title except as against a subsequent good-faith purchaser without notice."

Johnson v. Erlandson, 14 N. D. 518 (105 N. W. 722), was a case where Hogenson, the original owner, conveyed to Erlandson, which conveyance was never recorded. Erlandson executed a deed to Baker, but it was never delivered, and was fraudulently put on record by Baker, and plaintiff claims through Baker. The question was whether the fact that the deed to Erlandson was unrecorded put plaintiff on inquiry or charged her with notice of Erlandson's rights. The court say, in substance:

"It is urged that the failure to record the deed from Hogenson to Erlandson was sufficient to put plaintiff upon inquiry and charge her with notice of the facts which inquiry of Erlandson would have disclosed."

The court further say:

"We cannot agree with this argument. The fact that the record failed to show that Hogenson had ever parted with his title was constructive notice of Hogenson's rights and nothing more. The only subject of inquiry suggested by that fact was the question as to whether or not Erlandson had unconditionally acquired Hogenson's title. It is admitted that such is the fact."

The Massachusetts cases hold that the attaching creditor is not protected in his levy unless the attachment debtor had at the time of the levy a record title, on the theory that that is his means of information (*Cowley v. McLaughlin*, 141 Mass. 181 (4 N. E. 821); *Haynes v. Jones*, 5 Metc., Mass., 292; but in the former case the court suggest that if he knew at the time of the attachment that the title had passed to the attaching debtor it might be sufficient. In *Davis v. Lutkiewicz*, 72 Iowa, 254 (33 N. W. 670), it may be inferred that the mortgagees had knowledge of the conveyance to their mortgagor, and in *Johnson v. Erlandson*, 14 N. D. 518 (105 N. W. 722), the plaintiff, in taking her title under an unrecorded deed, had the same character of information of its execution as the attaching creditor had in this case, viz., the statement of the grantor in the unrecorded deed. In this case the attaching creditor had information from Lentz, Duvall's grantor, that a conveyance had been made to Duvall; and I am convinced that in such a case a purchaser for value without notice is not, by reason of the absence of the vendor's title from the record, put upon inquiry or charged with notice that the grantee in the unrecorded deed had previously conveyed the property.

MR. COMMISSIONER SLATER concurs in this dissenting opinion.

Decided 21 January, rehearing denied 11 February, 1908.

FRYE v. MOFFET.

98 Pac. 353.

PARTITION—POSSESSION—TENANTS IN COMMON—BURDEN OF PROOF.

The burden is on plaintiff in partition, unless the suit is by one or more tenants in common of a vested remainder or reversion, to allege and prove, if denied, that he and defendant were in possession as tenants in common at the time of the commencement of the suit.

From Malheur: GEORGE E. DAVIS, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a suit by Emma Frye against James T. Moffet for the partition of real property. The complaint alleges that plaintiff and defendant are the owners in fee, as tenants in common, of the property in question, but does not allege that plaintiff is in possession as such tenant. On the contrary, it is averred that defendant "has had the sole use and occupancy" of the property since the 1st of November, 1904, and has been receiving the rents and profits therefrom, and prays that he be required to account to plaintiff therefor. A demurrer to the complaint, because it does not state facts sufficient to constitute a cause of suit, was overruled, and defendant answered, denying the material averments thereof, and for a further and separate defense alleging that he is the sole owner of the property, and has been in the exclusive possession thereof since the 17th day of November, 1902. The reply put in issue the averments of the answer, and upon the issues thus joined a trial was had. From the evidence it appears that plaintiff and defendant were formerly husband and wife, but were divorced in October, 1903. On the 17th of November, 1902, and while they were such husband and wife, one J. H. Wright executed a deed, without his wife joining therein, and having but one witness, purporting to convey the property in controversy to them jointly and delivered it to plaintiff. Shortly thereafter she separated from her husband, and subsequently secured a divorce. About the time of the separation defendant entered into possession of the property in dispute, and has ever since remained in the sole and exclusive possession thereof. In June, 1904, plaintiff com-

menced this suit, claiming that the deed from Wright conveyed the property to her and defendant, who were then husband and wife, as tenants by the entirety, which was subsequently dissolved by the decree of divorce, leaving them tenants in common. Defendant claims, however, that he purchased the property of Wright for his own use and benefit, paying a part of the purchase money at the time, and was to receive a deed upon payment of the balance; that the deed made by Wright to himself and plaintiff was without his knowledge or consent, and that he knew nothing about it until after the decree of divorce, when he discovered it in a trunk in his house; that he immediately repudiated the transaction, offered to return the deed to Wright, and thereafter tendered him the balance of the purchase money, and demanded a good and sufficient conveyance from him. Plaintiff, on the other hand, claims that she was a joint purchaser with defendant of the property, and furnished the money with which to make the first payment, and afterwards paid a part of the balance; that the deed from Wright was made to herself and defendant, with his knowledge and consent, and by his direction. The court below found that plaintiff and defendant were the owners in fee and in possession as tenants in common; that the property could not be divided without great prejudice to their interests, and directed a sale and division of the proceeds. A sale was afterwards made and confirmed, and defendant appeals. REVERSED.

For appellant there was a brief over the names of *C. M. McGonagill*, *W. H. Brooke* and *Sarton & McConnell*, with an oral argument by *Mr. Brooke*.

For respondent there was a brief with an oral argument by *Mr. George W. Hayes*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

We think the decree must be reversed. It is incumbent on a plaintiff in a suit for partition, unless the suit is brought by one or more tenants in common of a vested remainder or reversion, to allege and prove, if denied, that he and the defendant were in possession of the property as tenants in common at

the time of the commencement of the suit: *Sterling v. Sterling*, 43 Or. 200 (72 Pac. 741). And this the present plaintiff does not do. She does not allege that she was in possession; but, on the contrary, avers that defendant was and ever since November, 1904, has been in the sole occupancy of the premises, and such are the facts that appear from the evidence. Ordinarily the possession of one tenant in common is the possession of both; but this record discloses a dispute as to the title and right of possession of real property, and until it is determined, and plaintiff secures possession in some appropriate proceeding, she cannot maintain a suit for partition.

Decree reversed, and complaint dismissed.

COMMISSIONER KING, having been of counsel, took no part in this decision.

Decided 21 January, 1908.

THORSEN v. HOOPER.

98 Pac. 361.

CLAIMS NOT SUBJECT TO GARNISHMENT—INDEBTEDNESS OF ESTATE.

1. A debt due from decedent's estate is not subject to garnishment until the share of the creditor, heir, or legatee, has been ascertained and ordered paid by the court, prior to which the money or funds of the estate are in *custodia legis*, and not subject to levy.

PAYMENT—VOLUNTARY PAYMENT—RECOVERY.

2. One who voluntarily pays money in satisfaction of an asserted demand, with full knowledge of all the facts, cannot recover it, when the transaction is unaffected by any fraud, trust, confidence, or the like, because at the time of the payment he was ignorant of his legal rights.

SAME—MISTAKE OF FACT.

3. Payment of an illegal demand made under a mistake of fact may be recovered in an action for money had and received.

PAYMENT MADE ON MISTAKE OF FACT, IS RECOVERABLE.

4. An administrator having been garnished in a suit in which the attorney for the estate represented the creditor, judgment was recovered in favor of the creditor, on which an execution was placed in the hands of the sheriff for service, who notified the administrator that he had an order from the circuit court directing him to pay out of the funds of the estate the amount of the judgment and costs. The administrator thereupon advised with the attorney of the estate without knowledge that he was also representing the creditor in the garnishment proceedings, and was advised that the proceedings were regular, and that he was compelled to pay the money to the sheriff as demanded, which he thereupon did. *Held*, that the circuit court never having made an order in the garnishment proceedings requiring the administrator to pay the amount of the judgment out of the funds of the estate, the payment was made on mistake of fact, and was recoverable.

From Union: THOMAS H. CRAWFORD, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action for money had and received, and comes here on appeal from a judgment on the pleadings in favor of defendants. The facts are set out in detail in the pleadings of the respective parties. Briefly, they are that plaintiffs are the administrators of the estate of H. L. Buell, deceased, and N. C. McLeod was their attorney and legal adviser. At the time of his death Buell was indebted to H. C. Brown on a promissory note for \$1,000, with John Graham as surety. After the appointment of plaintiffs Brown presented to them a duly verified claim against the estate of their decedent for the amount due on such note. After such presentation the defendants, Hooper & Hudson, through McLeod, as their attorney, commenced an action at law in the circuit court of Union County, against Oscar Eaden and H. C. Brown, partners doing business under the firm name of Eaden & Brown, to recover the sum of \$342.35, and caused a writ of attachment to issue in such action. A copy of the writ, together with a notice of garnishment, was served on J. B. Thorsen, one of the plaintiffs, and in answer thereto he stated that "there is a balance due H. C. Brown of \$500, on principal and accrued interest." The defendants afterwards recovered judgment in their action against Eaden & Brown, and an order of the circuit court reciting the attachment of the claim of Brown against the Buell estate, and directing that the attached property be sold as on execution to pay the judgment, costs, and disbursements, and that the "claim in said hands of said administrators may be collected if the proceeds thereof can be so collected by the sheriff under his execution or order of sale herein." A few days later an execution was issued on this judgment, and placed in the hands of the sheriff for service, who notified plaintiff Thorsen, by telephone, that he had an order from the circuit court directing him to pay out of the funds of the Buell estate the amount of the judgment and costs of Hooper & Hudson against Eaden & Brown. Thorsen thereupon advised with McLeod, his attorney.

without knowledge that McLeod was also attorney for defendants, and McLeod told him that the attachment proceedings were regular, and that he was compelled to pay the money over to the sheriff as demanded. Thorsen, acting upon the statement of the sheriff as to the nature of the order of the circuit court and the advice of McLeod, paid the money over to the sheriff, and it was afterwards paid by that officer to the defendants. At the time of the service of the garnishment process upon Thorsen no order of the county court had been made for a distribution of the funds of the Buell estate or directing the administrators to pay the claim of Brown, and the promissory note, upon which such claim was based, did not belong to Brown, but had previously been assigned by him to Jennie P. Brown, who subsequently sued and recovered the amount thereon from Graham, the surety.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. James D. Slater*.

For respondent there was a brief and an oral argument by *Mr. Charles H Finn*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. The debt due from the Buell estate on the claim presented by Brown was not subject to attachment by Brown's creditor at the time the writ of garnishment was served upon Thorsen, one of the administrators. No order of the county court had been made settling the claim or directing its payment, and until the share of a creditor, heir, or legatee of an estate has been ascertained and ordered paid by the court, the money or funds of the estate are in the custody of the law, and not subject to levy under execution or process of garnishment.

2. The defendants contend that the payment of the money to the sheriff by Thorsen was voluntarily made, and therefore cannot be recovered by him and his co-administrators. It is well settled that one who voluntarily pays money in satisfaction of an asserted demand, with full knowledge of all the facts, cannot recover it when the transaction is unaffected by any

fraud, trust, confidence, or the like, because at the time of the payment he was ignorant of his rights under the law: *Shriver v. Garrison*, 30 W. Va. 456 (4 S. E. 660); *Brumagin v. Tillinghast*, 18 Cal. 265 (79 Am. Dec. 176); *Evans v. Hughes County*, 3 S. D. 244 (52 N. W. 1062); *Commercial Bank of Rochester v. City of Rochester*, 42 Barb. 488; *Erkens v. Nicolin*, 39 Minn. 461 (40 N. W. 567).

3. But it is equally as well settled that when the payment of an illegal demand is made under a mistake of fact it may be recovered in an action for money had and received: *Stokes v. Goodykoontz*, 126 Ind. 535 (26 N. E. 391); *Wolf v. Beaird*, 123 Ill. 585 (15 N. E. 161; 5 Am. St. Rep. 565); *Walker v. Hill*, 17 Mass. 380; *Rogers v. Weaver*, 5 Ohio, 536. These questions are ably and exhaustively considered by Mr. Justice WOLVERTON, in his opinion in *Scott v. Ford*, 45 Or. 531 (78 Pac. 742; 80 Pac. 899), and it is unnecessary to add to the discussion at this time.

4. Now it appears from the facts, as alleged in the pleadings in the case at bar, that the payment by Thorsen to the sheriff, was made under a mistake of fact as to the nature of the order of the circuit court and upon the advice of the attorney for the defendants, who he supposed at the time was acting for the estate. Thorsen was notified by the sheriff that the circuit court had made an order in the attachment proceedings requiring him to pay the amount of the judgment, recovered by Hooper & Hudson against Eaden & Brown, out of the funds of the estate, and that such order was in the hands of the officer for execution, when in fact, no such order had been made. Relying upon this statement, and the erroneous advice of the attorney for the defendants, he paid the amount of the judgment out of the trust funds in his hands, and the money was subsequently paid to the defendants. If these facts are true, and for the purposes of this case it must be so assumed, we think that in equity and good conscience plaintiff should be permitted to recover it.

Judgment of the court below will therefore be reversed, and

the cause remanded, with directions to overrule the motion of defendants for judgment on the pleadings, and for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

Decided 21 January, 1908.

BADE v. HIBBERD.

98 Pac. 364.

JUSTICES OF THE PEACE—APPEAL—RECORD—CONCLUSIVENESS—IMPEACHING BY AFFIDAVITS.

1. Where the record of a justice's court states that a reply was filed in that court before trial, and the reply is attached to the justice's transcript and returned as one of the original papers in the case, the record cannot be impeached by *ex parte* affidavits because the justice failed to endorse on the reply the date of its filing.

FILING FOR RECORD—NECESSITY OF INDORSEMENT.

2. A paper is filed for record in contemplation of law when it is delivered to the proper officer with the intention that it shall become part of the official record, and by him received to be kept on file, and the filing is not affected by the officer's failure to indorse the paper as filed.

PLEADING—COMPLAINT—OBJECTION ON TRIAL—PRESUMPTION.

3. Where an objection to the sufficiency of the complaint is made for the first time on the trial by objecting to the reception of any evidence thereunder, the same presumption will be indulged in to support the pleading as if the objection had been made after verdict, and unless the complaint is so defective that it would not be good after verdict, the objection will be overruled.

SAME—INSUFFICIENT DESCRIPTION OF INSTRUMENT SUED ON—CURE BY VERDICT.

4. An insufficient description of contracts on which suit is brought, is merely a defective statement of the cause of action, which would be cured by verdict.

ACTION—JOINDER—CAUSES ARISING UNDER CONTRACT.

5. Under the express provisions of Section 94, B. & O. Comp., more than one cause of action arising out of contract may be united in the same complaint, but must be separately stated.

PLEADING—SEPARATE CAUSES OF ACTION—SEPARATE STATEMENT—OBJECTION WHEN TO BE TAKEN.

6. The objection that separate causes of action are not separately stated cannot be raised during the admission of testimony, but should be taken by motion to strike out under Section 106, B. & O. Comp., providing that when a pleading contains more than one cause of action, if they be not pleaded separately, the pleading may be stricken out on motion of the adverse party.

CONTRACT—ACTION FOR BREACH—EVIDENCE.

7. In an action to recover a balance due for services and for merchandise sold, evidence examined, and held for the jury.

EVIDENCE—PAYMENT—PAYMENT BY CHECK—PAROL EVIDENCE TO EXPLAIN.

8. A memorandum on a check received in payment of merchandise sold that it is for the balance due on a particular item of indebtedness, is not conclusive on the seller, but may be explained by parol.

APPEAL—REVIEW—PRESUMPTION—PLEADINGS.

9. Where a complaint is indefinite as to the character of a contract sued on, but contains averments which seem to imply that it was an express contract, and no objection is made to the complaint until the trial, on appeal the action will be construed as on an express contract.

CONTRACTS—RESCISSION.

10. The fact that defendant, after contracting with plaintiff to cut grain, rented the land upon which the grain was to be grown to a tenant, who was to pay for the cutting of the grain, did not operate as a rescission of his contract with plaintiff, nor relieve him from liability thereon, since plaintiff was not a party to the second contract.

TRIAL—EVIDENCE—ORDER OF PROOF—DISCRETION OF COURT.

11. Where defendant placed in evidence during plaintiff's evidence in chief, a check given by defendant to plaintiff, containing a memorandum implying that it was for the balance due on an item of plaintiff's claim, and introduced evidence to show that plaintiff received the check without objecting to the memorandum, the court could in its discretion allow plaintiff in rebuttal to testify that the memorandum was not on the check when he received it.

From Union: THOMAS H. CRAWFORD, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This action was commenced in the justice's court to recover money. The complaint alleges that between January and September, 1906, defendant became indebted to plaintiff in the sum of \$369.50 for work and labor in cutting 79 acres of grain at the agreed price of \$1.25 per acre, amounting to \$98.75, and for 285 sacks of wheat sold and delivered at 95 cents per sack, amounting to \$270.75, which defendant promised and agreed to pay; that no part thereof has been paid, except by the delivery to plaintiff of 120,000 feet of saw logs, at the agreed price of 85 cents per 1,000, amounting to \$102, and by a check of \$187.40, leaving a balance due of \$80, for which judgment is demanded. Defendant by his answer denies all the material allegations of the complaint, and for a further and separate defense avers that on or about the 18th of October, 1906, he and plaintiff had a full and complete settlement for cutting 15 acres of the grain, set out and included in the first item of the complaint, at \$1.25 per acre, and 285 sacks of wheat, mentioned

in the second item of the complaint, and it was then and there mutually agreed that the credits referred to in the complaint in the sum of \$289.40 should be applied in full payment for cutting said 15 acres of grain, and for the 285 sacks of wheat, and for no other purpose. Plaintiff had a judgment for \$80 in the justice's court, and defendant appealed to the circuit court. A transcript on appeal was filed in the circuit court; but, being incomplete and not properly certified, was, on motion of defendant, withdrawn and returned to the justice for correction and certification, and as again filed contained a copy of the justice's docket, showing that a reply was filed before the cause was set for trial, and annexed to the transcript is a reply, denying generally all the allegations of the answer, but which has no file marks thereon. Defendant moved the circuit court to strike such reply from the transcript, for the reason that it was not filed by the justice, and neither accompanied nor was referred to in the transcript as first filed in the circuit court. This motion was overruled, and trial had, resulting in judgment in favor of plaintiff, from which defendant appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Charles H Finn*.

For respondent there was a brief and an oral argument by *Mr. Joseph F. Baker*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. The motion to strike the reply from the transcript was properly denied. The record of the justice's court states that the reply was filed in that court before trial, and the justice attached such reply to the transcript and returned it as one of the original papers in the cause, and this record cannot be impeached by *ex parte* affidavits.

2. The fact that the justice failed to indorse on the reply the date of its filing is of no consequence. A paper is filed in contemplation of law when it is delivered to the proper officer with the intention that it shall become a part of the official

record, and by him received to be kept on file, and such filing is not affected by the officer's failure to indorse the same: *McDonald v. Crusen*, 2 Or. 258; *Conant's Estate*, 43 Or. 530 (73 Pac. 1018).

3. On the trial, defendant objected to the admission of any testimony on behalf of plaintiff, for the reason that the complaint does not state facts sufficient to constitute a cause of action, and because two causes of action are improperly united. The objection to the sufficiency of the complaint being made for the first time on the trial, the same presumption will be indulged in to support the pleading as if the objection had been made after verdict: *Specht v. Allen*, 12 Or. 117 (6 Pac. 494); *McCall v. Porter*, 42 Or. 49 (70 Pac. 820, 71 Pac. 976); *Patterson v. Patterson*, 40 Or. 560 (67 Pac. 664); *Currey v. Butcher*, 37 Or. 380 (61 Pac. 631). Unless, therefore, the complaint is so fatally defective that it would not be good after verdict, the objection to the admission of testimony in its support was properly overruled.

4. The objection made to the complaint is that the contracts under which the services are alleged to have been rendered and the grain sold by plaintiff to defendant are not sufficiently set out; but this is manifestly nothing more than a mere defective statement of a good cause of action, and such as would be cured by verdict: *Booth v. Moody*, 30 Or. 222 (46 Pac. 884).

5. The causes of action mentioned in the complaint both arise out of contracts, and can be properly united in the same complaint: Section 94, B. & C. Comp.

6. The objection that they are not separately stated should have been taken by motion at the proper time (Section 106, B. & C. Comp.), and cannot be raised during the admission of testimony.

7. The plaintiff testified that he cut 79 acres of grain for defendant under a contract by which he was to receive \$1.25 per acre, to be paid in logs at 85 cents per 1,000, and that he sold and delivered to him 285 sacks of wheat at 95 cents per sack; that he received of defendant, on account thereof, 120,000

feet of logs at 85 cents per 1,000, and \$187.40 by check, and identified a check for that amount in his favor signed by defendant, which had, as a memorandum thereon, the words "balance on wheat"; that the logs received by him more than paid for cutting the grain, but that defendant had not paid in full for the wheat. At the close of plaintiff's testimony defendant moved for a nonsuit on the ground that since defendant admitted that the cutting of the grain had been paid by logs delivered to him by defendant, and the check received by him as a payment on the wheat, shows on its face that it was for the balance thereon, nothing remained due plaintiff on the causes of action set out in the complaint. But this motion was properly overruled.

8. While defendant testified that the value of the logs delivered to him by plaintiff, if applied on the account for cutting the grain, would overpay such account, he insisted that there was still a balance due on the wheat sold and delivered. The action is brought to recover a balance of \$80, alleged to be due plaintiff from defendant on the two items mentioned in the complaint, and it can make no difference, so far as the ultimate rights of the parties are concerned, whether the value of the logs be applied on one or the other. The memorandum on the check that it was for the balance due on the wheat was not conclusive on plaintiff, but was subject to be explained by parol, and the weight to be given it was for the jury.

9. Plaintiff, over defendant's objections and exceptions, gave testimony tending to show that in January, 1906, he contracted with defendant to purchase from him some saw logs, thereafter to be cut, at 85 cents per 1,000, in consideration of which he agreed to cut certain grain for defendant during the following season at \$1.25 an acre. Objection is made to this testimony, because it tends to show an express contract, while it is claimed the complaint is on a *quantum meruit*. The complaint is somewhat indefinite and uncertain as to the character of the contract sued upon; but it is averred that the work was to be done at an agreed price per acre, which would seem to imply that it

was under an express contract, and as no objection was made to the complaint until the trial, it should now be construed as an action on such a contract.

10. Defendant gave evidence tending to show that in May, 1906, after the making of the alleged contract with plaintiff, he informed him that he had leased the land upon which the grain was to be grown to one McCulloch, who was to pay for the cutting of the grain and all expenses of the farm after the 1st of March, 1906. Defendant claims that this amounted to a rescission of the contract between himself and plaintiff, and requested the court to so instruct the jury. A rescission of the contract is not pleaded as a defense, nor is the evidence referred to sufficient for that purpose. It is only to the effect that after the making of the contract with plaintiff, defendant leased the land upon which the grain was to be grown, and the tenant agreed to pay for the harvesting thereof; but this was a contract between the defendant and his tenant, to which the plaintiff was not a party, and did not relieve defendant from his liability on his contract with the plaintiff.

11. Complaint is also made because the court permitted plaintiff in rebuttal to testify that the words "balance on wheat," appearing on the check given to him by defendant and introduced in evidence, were not on such check at the time it was delivered; but this evidence was competent, and the order of proof was in the discretion of the trial court.

There are several other assignments of error in the record, but on examination we are satisfied that they are without merit. Judgment of the court below is affirmed. **AFFIRMED.**

Argued 14 January, decided 21 January, 1908.

RODMAN v. MANNING.

98 Pac. 306.

APPEAL—FILING NOTICE AND PROOF OF SERVICE—TRANSCRIPT—IMPEACHING RECORD.

1. Section 549, B. & C. Comp., provides that, when an appeal is not taken at the time the decision is rendered, it may be taken at any time within six months thereafter by serving a notice on the adverse party or his attorney, and filing the original with proof of service indorsed thereon with the clerk.

Held, that where the notice of appeal as it appeared in the transcript showed that it was filed August 26th, while the endorsement of proof of service was dated September 26th, appellants could not contradict the transcript by extraneous evidence showing that the service was in fact admitted August 28th, and the notice with the endorsement of such admission thereon was afterwards filed with the clerk, the remedy being by application to the court below to correct the record.

APPEAL—JURISDICTION CANNOT BE WAIVED BY PARTIES.

2. Serving and filing of notice of appeal are essential to give the Supreme Court jurisdiction, and cannot be waived by the parties.

From Lane: LAWRENCE T. HARRIS, Judge.

Plaintiff obtained a decree in the circuit court of Lane County, from which the defendant attempts to appeal. Respondent now moves to dismiss the appeal. DISMISSED.

Williams & Bean for the motion.

I. N. Harbaugh and *Coovert & Stapleton*, contra.

PER CURIAM: On August 1, 1907, plaintiff recovered a decree in the circuit court for Lane County against defendants, and from this decree defendants attempt to appeal. The notice of appeal, as it appears in the transcript, shows that it was filed on August 26th, and the indorsement of proof of service is dated the 26th of the following month. The plaintiff moves to dismiss the appeal for want of jurisdiction, because the proof of service of the notice was not indorsed thereon at the time it was filed.

1. The statute provides that, when an appeal is not taken at the time the decision is rendered, it may be taken at any time within six months thereafter by serving a notice on the adverse party or his attorney, "and filing the original with proof of service indorsed thereon," with the clerk: Section 549, B. & C. Comp. It has been held under similar statutory provisions that a notice of appeal, when filed, must be accompanied by proof of service in the shape of an indorsement thereon, and that service cannot be made and proof thereof placed on the notice after it has been filed: *Briney v. Starr*, 6 Or. 207; *Henness v. Wells*, 16 Or. 266 (19 Pac. 121). Defendants claim, however, and have filed *ex parte* affidavits to show, that the dates of filing of notice and acknowledgment of service thereof, as they

appear on the transcript, are erroneous, and in fact the service was admitted on August 28th, and the notice with the indorsement of such admission thereon was afterwards filed with the clerk. But, if there is an error in the record in this respect, the remedy is by application to the court below to correct the same, and the transcript as filed here cannot be contradicted or impeached by extraneous evidence: *Briney v. Starr*, 6 Or. 207.

2. Again, it is said that plaintiff has waived the objection by filing his brief in this court; but the service and filing of the notice of appeal are indispensable in order to give this court jurisdiction, and cannot be waived by the parties: *Oliver v. Harvey*, 5 Or. 360; *Wolf v. Smith*, 6 Or. 73.

We need not consider at this time what the effect would have been if defendants had applied to and obtained permission from the court below to withdraw the notice from the files, and had refiled it, after the date of admission of the service thereon, as that question is not before us. Upon the record as it stands we have no alternative, under the previous decisions of the court, but to dismiss the appeal, and it is so ordered.

APPEAL DISMISSED.

Decided 21 January, 1908.

FIRST NATIONAL BANK v. McCULLOUGH.

93 Pac. 366.

TRIAL—EVIDENCE—ORDER OF PROOF—STATUTORY PROVISIONS.

1. In an action by a bank on notes transferred to it without endorsement, admission of evidence tending to show that the original holder had agreed to cancel the notes before showing that the one transferring the notes to the bank had knowledge of the agreement, is not error, in view of Section 812, B. & O. Comp., providing that the order of proof shall be regulated by the sound discretion of the court.

APPEAL—QUESTIONS TO BE CONSIDERED—MATTERS NOT RAISED IN LOWER COURT.

2. Where a bank sues on notes indorsed to its cashier in his own name only, and the question of the bank's right to maintain the action is not raised at the trial, it cannot be considered on appeal.

EVIDENCE—PAROL EVIDENCE AS TO INDORSEE—STATUTORY PROVISIONS.

3. The provision of the negotiable instrument law (Section 444, B. & O. Comp.) that, when an instrument is drawn or indorsed to a person as "cashier"

of a bank, it is deemed *prima facie* to be payable to the bank of which he is such officer, and may be negotiated by the indorsement of either the bank or the officer, was based on the theory that the qualifying word creates an ambiguity as to the real party intended, to explain which parol evidence is admissible; but, where a note is endorsed to N. without any qualifying word, even if N. is in fact the cashier of a bank, parol evidence is not admissible to show that the bank was the party intended as the indorsee.

APPEAL—REVIEW—CROSS-EXAMINATION—BILL OF EXCEPTIONS.

4. An assignment of error as to permitting cross-examination of a witness regarding matters not testified to on direct examination, cannot be considered, when the bill of exceptions does not purport to contain all his testimony on direct examination.

BILLS AND NOTES—EFFECT OF TRANSFER WITHOUT INDORSEMENT—DEFENSES.

5. Under the law merchant, which has become a part of the common law, a transfer of a promissory note, payable to order, to bar equities, must be by indorsement to one who has no notice of the equities, and for a valuable consideration before maturity. Hence, where a note is indorsed to the cashier of a bank, who delivers it to the bank without indorsement, in a suit thereon by the bank the note is subject to all equities existing in favor of the makers.

SAME—RIGHT OF ACTION—STATUTORY PROVISIONS.

6. A transfer without indorsement of a promissory note, payable to order, assigns under the law merchant only an equitable right, which could be enforced by suit in the name of the payee only; but under Section 27, B. & C. Comp., providing that every action, with certain exceptions, shall be prosecuted in the name of the real party in interest, a bank may maintain an action in its own name on a note transferred to it without indorsement.

APPEAL—FINAL ORDERS—DENIAL OF NEW TRIAL.

7. The denial of a motion for a new trial is not a final order from which an appeal will lie.

SAME—RESERVATION OF GROUNDS OF REVIEW.

8. A decision of a trial court is not reviewable on appeal, unless the question was distinctly presented to the trial court for its action. Hence, where the trial court was not requested to give any instruction involving a consideration of all the testimony, the evidence will not be examined on appeal to determine whether, on the whole evidence, the judgment was right.

From Umatilla: HENRY J. BEAN, Judge.

Statement by MR. JUSTICE MOORE.

This is an action by the First National Bank of Pomeroy, Iowa, a corporation, against B. F. McCullough and M. H. Gillette, to recover on two promissory notes. The facts, so far as deemed material herein, are that on March 2, 1904, and November 23d of that year, the defendants obtained from one W. J. Furnish, leases of certain lands in Umatilla County for a term which would expire March 1, 1907, agreeing to give for the use of the premises \$640 annually. This sum was evidenced

by their negotiable promissory notes, executed to Furnish, for \$512 and \$128, respectively, which instruments, given for the rent of 1905, were payable June 1, 1906. The leases did not contain a covenant to the effect that in case of a sale of the real property the tenancy could be terminated at the option of either party. The landlord, in the fall of 1905, listed the land with one M. L. Moody, an agent, for sale, to whom he duly indorsed the notes, which would mature June 1, 1906. The agent having entered into a contract for the sale of the premises with one G. E. York, the defendants surrendered to the latter the possession of the real property, and relinquished to him all their rights under the leases. The notes mentioned were, prior to their maturity, transferred by the following indorsement: "Pay A. B. Nixon or order, waiving demand and notice of protest. H. L. Moody." The person named as the last indorsee was at the time of such transfer the cashier of the plaintiff bank. No part of the notes having been paid, this action was instituted without any other written transfer of the negotiable instruments. The complaint, embracing two causes of action, is in the usual form, states when the notes were executed, and contains, *inter alia*, in each count, the following averment: "That thereafter, and before the maturity thereof, said note was indorsed, transferred, and assigned to the plaintiff herein, and plaintiff is now the owner and holder of said note." The answer denies the material allegations of the complaint, states the facts, in substance as hereinbefore detailed, and avers, in effect, that about March 8, 1906, and while the defendants had a crop growing on the leased land, they, at the request of Furnish, who then was the owner and holder of the notes sued on, and at the solicitation of York, who had secured a contract for the purchase of the premises, surrendered to the latter the possession of the real property, in consideration of the cancellation of the notes given for the rent; that at that time Moody, who was then the agent of Furnish, was advised by the defendants of the payment of the notes, which, without any consideration therefor, and not in

the ordinary course of business, were delivered to the plaintiff. The allegations of new matter in the answer were denied in the reply, and the cause having been tried, the defendants secured a verdict, and from the judgment rendered thereon, the plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *McCourt & Phelps*, with an oral argument by *Mr. John McCourt*.

For respondent there was a brief over the names of *Lowell & Winter*, with an oral argument by *Mr. John P. Winter*.

MR. JUSTICE MOORE delivered the opinion of the court.

1. It is contended that an error was committed in permitting the defendants to introduce evidence tending to show that the notes sued on were agreed to be canceled by Furnish without having first shown that Nixon, the cashier of the plaintiff bank, had knowledge of the alleged agreement. The order of proof is a matter within the sound discretion of the trial court, the exercise of which will not be disturbed, except for an abuse of such discretion: Section 842, B. & C. Comp.; *Jones v. Peterson*, 44 Or. 161 (74 Pac. 661). An examination of the bill of exceptions fails to disclose any misuse of the power thus reposed.

2. It is maintained that the court erred in striking out, over objection and exception, Moody's testimony to the effect that the notes in question were indorsed to the plaintiff. No question seems to have been raised at the trial as to the right of the bank to maintain this action as the real party in interest. The consideration of the exception reserved is therefore limited to an inquiry as to whether or not parol evidence was admissible to show that the indorsement of the notes to Nixon, though not designated as cashier, was such a transfer as vested the legal title in the bank, and precluded the defendants from maintaining any defense that they might have had against the payee or indorsee. We will examine the cases to which plaintiff's counsel call attention in support of the legal principle which they seek to invoke. In *Arlington v. Hinds*, 1 D. Chip. (Vt.) 431

(12 Am. Dec. 704), it was held that a note made to a town treasurer, "or his successors in office," might be sued by the town. In *National Life Ins. Co. v. Allen*, 116 Mass. 398, it was ruled that a principal might sue in his own name on a non-negotiable promissory note, given for its benefit, but by its terms made payable to "J. T. Phelps, agent." In *Bank of New York v. Bank of Ohio*, 29 N. Y. 619, in adhering to the rule announced in the case of *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312, it was determined that a bill drawn payable to "D. C. Converse, Esq., cashier," was payable to the bank of which he was the officer. So too, in *Baldwin v. Bank of Newbury*, 1 Wall. (U. S.) 234 (17 L. Ed. 534), it was adjudged that, where negotiable paper was drawn to a person by name, immediately after which appeared the word "cashier," but with no designation of the particular bank of which he was such officer, parol evidence was admissible to show that he was the cashier of the bank which was plaintiff in the suit, and that in taking the paper he was acting as agent for the corporation.

3. The rule to be extracted from these decisions has been embodied in our statute, known as the "Uniform Negotiable Instrument Law," as follows:

"When an instrument is drawn or indorsed to a person as 'cashier,' or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer": Section 4444. B. & C. Comp.

The clause just quoted, and the decisions adverted to, are undoubtedly based on the theory that the employment of the qualifying word "cashier" or other designation of a fiscal office, appended to the name of a payee or indorsee of commercial paper, creates an ambiguity as to the real party intended, to explain which parol evidence is admissible to show who is the principal for whose benefit such agent received or accepted the promise to pay a stipulated sum of money. In the case at bar, however, no official designation is added to Nixon's name, and hence no uncertainty is apparent from an inspection of the in-

indorsement made by Moody to him, and parol evidence was inadmissible to control or vary the terms of the writing. In view of the purpose for which Moody's testimony was evidently offered, no error was committed in striking it out.

4. It is insisted that the court erred in requiring Moody to be cross-examined, over objection and exception, as to certain matters to which he had not theretofore testified. The bill of exceptions shows that this witness, on direct examination, identified the notes sued on, and stated that he sent them with other negotiable instruments to Nixon, from whom he received a draft in payment therefor. On cross-examination he was required to testify as to other matters, but as the bill of exceptions does not purport to contain all his testimony on direct examination, the error thus assigned is unavailing.

5. It is argued that, having taken an exception to the following part of the court's charge, an error was committed in giving it, to wit:

"I instruct you, gentlemen of the jury, that the indorsement on the notes in question, under the evidence in this case, plaintiff did not come into possession of the notes in controversy in due course, or in the ordinary and usual course of business as recognized by the law; and therefore that any defense which these defendants may have had against said notes, if in the hands of the indorsee, H. L. Moody, will be available to the defendants as against this plaintiff."

The uniform practice of merchants in transferring credits, represented by commercial paper, as a means of purchasing goods or settling accounts, gave rise to certain rules, demanded by the wants and convenience of trading communities, which are known as the law merchant, and have become a part of the common law: 7 Cyc. 520; *Woodbury v. Roberts*, 59 Iowa, 348 (13 N. W. 312; 44 Am. Rep. 685). An observance of these rules requires that the property represented by a promissory note, payable to order, when transferred to a designated party before maturity for a valuable consideration and without notice, should be evidenced by an indorsement on the instrument, or

on a paper attached thereto, in order to bar the equities of antecedent parties. This method of transferring such property constitutes the ordinary or usual course of business, a departure from which is equivalent to a notice of equities, and subjects the negotiable instrument to defenses in the hands of a holder who has acquired a right thereto in any other manner: Section 4433, B. & C. Comp.; Randolph, Com. Paper (2d ed.) § 789; *Roberts v. Hall*, 37 Conn. 205 (9 Am. Rep. 308); *Franklin v. Twogood*, 18 Iowa, 515; *Elias v. Finnegan*, 37 Minn. 144 (33 N. W. 330). In *Osgood's Adm'rs v. Artt* (C. C.) 17 Fed. 575, Mr. Justice HARLAN, in discussing this subject, says:

"It is a settled doctrine of the law merchant that the *bona fide* purchaser for value of negotiable paper, payable to order, if it be indorsed by the payee, takes the legal title unaffected by any equities which the payor may have as against the payee. But it is equally well settled that the purchaser, if the paper be delivered to him without indorsement, takes, by the law merchant, only the rights which the payee has, and therefore takes subject to any defense the payor may rightfully assert as against the payee."

6. A transfer, without indorsement, of a promissory note payable to order, assigns to the holder, under the rules of the law merchant, only an equitable right, to enforce which suit was formerly required to be maintained in the name of the payee. Our statute demands that every action, except in certain cases not involved herein, shall be prosecuted in the name of the real party in interest: Section 27, B. & C. Comp. In *Moore v. Miller*, 6 Or. 254 (25 Am. Rep. 518), it was ruled that the holder of a note, payable to order, which has been transferred without indorsement, could maintain an action at law thereon in his own name. That decision, however, is not based on the section of the statute last referred to, but upon the fact that the evidence showed that the plaintiff therein possessed the title to the note sued on, and had the sole right to receive the money due thereon. As illustrating the right of a holder of a negotiable promissory note, transferred without indorsement, to maintain an action thereon in his own name, see the very able opinion of

Circuit Judge Gilbert in *First Nat. Bank v. Moore*, 137 Fed. 505 (70 C. C. A. 89). This legal principle is here adverted to for the purpose of showing that Moody's testimony was excluded, not on the ground of establishing a right in the plaintiff to maintain an action in its corporate name, but to prove that the bank was an indorsee, in due course, though not named in the evidence of the transfer, nor was any fiscal designation appended to the name of the indorsee from which it could be inferred that the plaintiff was the party intended by the writing. The note sued on having been delivered by Nixon, without indorsement, to the plaintiff, the bank was authorized to maintain an action thereon in its own name; but it took and held the paper subject to all equities existing in favor of the makers, and this being so, no error was committed in giving the instruction under consideration.

7. It is contended that the court erred in refusing to set aside the verdict and to grant a new trial, on the ground that no contract had been consummated between Furnish and the defendant, whereby the notes in question were to be canceled. The rule is settled in this state that the action of a court in granting or denying a motion for a new trial is not a final order from which an appeal lies. This principle has so often been announced that it is unnecessary to cite the cases which uphold the doctrine.

8. It is argued that as all the testimony given at the trial has been sent up a perusal thereof will conclusively show that no contract was ever entered into between the makers and the payee of the notes whereby they were to have been canceled, and hence the judgment should be reversed, and a new trial ordered. An appellate court is created to review errors alleged to have been committed by lower courts in the trial of law actions, to which rulings exceptions have been duly reserved. No determination of a trial court can be reviewed on appeal, unless the question has been distinctly presented to that tribunal for its action. In the case at bar the court was not requested to give any instruction that involved a consideration of all the testimony, and

this being so, that exhibit attached to the bill of exceptions will not be examined.

Other alleged errors are assigned, but, believing them unimportant, the judgment is affirmed. AFFIRMED.

Decided 28 January, rehearing denied 28 April, 1908.

TRICKEY v. CLARK.

93 Pac. 457.

TRIAL—WAIVER AND CORRECTION OF ERRORS—REFUSAL OF NONSUIT.

1. Though plaintiff did not prove a case sufficient to go to the jury, a refusal of a nonsuit will not be disturbed, if defendant afterward supplied the omission.

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY.

2. Whether defendants exercised reasonable care in providing a safe fastening for a lever, by the displacement of which a servant was injured, *held*, under the evidence, to be a question for the jury.

SAME—CONCURRING NEGLIGENCE OF MASTER AND FELLOW SERVANT.

3. A master is liable for injuries to a servant caused by the concurring negligence of the master and a fellow servant, which would not have happened, but for the master's negligence.

SAME—INJURY TO SERVANT—PROXIMATE CAUSE—QUESTION FOR JURY.

4. Whether the knocking loose of a carriage fastener by a fellow employee falling against it, resulting in plaintiff's son being injured was a natural consequence to be anticipated from defendant's failure to provide a safe and suitable fastener, *held*, under the evidence, a question for the jury.

TRIAL—INSTRUCTIONS—FAILURE TO REQUEST.

5. Where a party did not request a direct instruction upon a point, he should not complain of the court's failure to instruct thereon.

EVIDENCE—ADMISSIONS BY AGENT—COMPETENCY.

6. In an action to recover for injuries to plaintiff's son, resulting from the lever of a log carriage becoming unfastened, statements by defendant's agent while reconstructing the mill, that the lever fastening was defective, was properly received, as notice of such defect to the agent was notice to defendant.

SAME—OPINION EVIDENCE—EXPERT TESTIMONY—WHEN PROPER.

7. In an action for injuries resulting from a lever being defectively fastened, the opinion of expert millmen as to the safety and propriety of the fastening was not necessary or competent, where the construction of the device was fully explained to the jury, and no particular skill was required to determine its safety.

SAME—MATTERS OF COMMON KNOWLEDGE.

8. In an action for injuries resulting from a lever being defectively fastened, testimony that the pin in the fastener was so loose that the jar of the mill worked it out, and that the fall of the fastener tended to knock it out, given in explaining the models of the lever and fastener to the jury, was not expert testimony.

APPEAL—RECORD—QUESTIONS PRESENTED—ARGUMENT OF COUNSEL.

9. Where an objection to an argument was overruled, on the ground that it was fairly an answer to the contention of the defendant's, the argument of defendant's counsel, not being in the record, such ruling cannot be reviewed

From Multnomah: ALFRED F. SEARS, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action to recover damages for personal injury suffered by plaintiff's son, a lad about 17 years of age, while working for defendants. At the time of the injury, and for some time prior thereto, defendants were operating a steam sawmill at Linnton, a few miles below Portland, which they had purchased a few months previously. The mill was equipped with an upright iron feed lever fastened to the floor about 2½ feet from the saw pit, and which was connected with the engine and operated by the sawyer in moving the log carriage forward and backward while cutting lumber. When the lever was in an upright position the log carriage was at rest; but as there was danger of it being accidentally moved, and the carriage set in motion, it was provided with a cast-iron drop fork lock or fastener attached to the frame a few inches from the floor on the side next to the saw pit, and an iron pin passing through the lever and frame just below the lock for the purpose of securely holding the lever in position when the carriage was at rest. As the appliance came from the manufacturer, the lock or fastener projected about an inch from the lever frame, and could be conveniently raised and lowered into place with the hand only. Some time prior to defendants' purchase of the mill, however, a concave steel plate projecting about 2¼ inches had been riveted to the face of the lock to enable the sawyer to manipulate it with his foot; but for some reason the use of the lock, as thus equipped, had been abandoned by the former owner of the mill. Two or three months before the accident complained of, and while defendants were overhauling and repairing the mill, their millwright and superintendent contemplated reinstalling the lock; but objection was made to his doing so by some employees because it was unsafe, and had previously permitted an automatic movement of the carriage. The attention of one of

the defendants was called to the matter, and he suggested that a hole be made through the frame and lever just below the lock, and an iron pin be provided to supplement the lock, which was done accordingly. As thus equipped the lever was used by defendants up to the time of the accident.

It was necessary in the operation of the mill to remove the band saws from the wheels upon which they operated four times a day and take them to the filing room to be filed. Plaintiff was employed by defendants as saw filer, with his son as an assistant, and they were accustomed to aid in the work of removing the saws and taking them to the filing room. It required five or six men to do this, and they had to work in the space between the saw pit and the lever, and roll or move the saws over and across the carriage track to get them to the filing room. On the day of the accident, and while a saw was being removed and taken to the filing room, the teeth caught in the clothes of one of the workmen, and he was thrown against the lever, knocking out the pin, loosening the lock, and starting the log carriage, which caught and severely injured plaintiff's son.

This action is brought to recover damages for the injuries so sustained. The negligence charged in the complaint is that defendants "carelessly and negligently failed to maintain a proper or safe fastening for said lever, so as to prevent it from jarring loose, or from being accidentally moved by workmen employed in and about the mill, and that the unsafe condition of said lever in being insufficiently fastened and secured was known to the defendant during all of said time." The defendants deny the negligence charged in the complaint, and affirmatively allege (1) that they had equipped their mill with reasonably safe machinery, tools and implements, such as ordinarily used in similar mills. and that it was provided with ordinarily safe machinery and appliances in good repair and condition at the time of injury to plaintiff's ward; (2) that while the saw was being removed to the filing room by plaintiff and his fellow servants one of such servants accidentally fell against the lever and released the fastening thereof, so that the log carriage was propelled forward, injuring plaintiff's son, which accident was un-

avoidable by defendants; (3) that whatever negligence, if any, caused the injury was that of a fellow servant and not the defendants; (4) that plaintiff's son fully understood the manner in which the lever was fastened, and the dangers incident thereto, and with such knowledge voluntarily entered upon and continued in defendants' service, and thus assumed all the risks and hazards reasonably to be apprehended in the performance of his duties. The reply put in issue the averments of the answer. Trial resulted in verdict and judgment in favor of plaintiff, and defendants appeal, assigning error in overruling their motion for nonsuit, in the admission and rejection of evidence, and in giving and refusing certain instructions.

AFFIRMED.

For appellants there was a brief with oral arguments by *Mr. J. F. Boothe* and *Mr. Rufus Mallory*.

For respondent there was a brief with oral arguments by *Mr. E. E. Coover* and *Mr. G. W. Stapleton*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. The record contains all the evidence given on the trial. In determining the questions arising on the motion for nonsuit we are therefore to consider the entire evidence. If plaintiff had not proved a cause sufficient to be submitted to the jury when he rested, the ruling on a motion for a nonsuit will not be disturbed, if defendants afterward supplied the omission: *Bennett v. N. P. Ex. Co.* 12 Or. 49 (6 Pac. 160).

2. Upon the entire record we think it cannot be said, as a matter of law, that there was no competent evidence tending to show that defendants did not exercise reasonable care in providing a suitable lock or fastener for the log carriage lever, under the circumstances attending its situation and location. The lock had been changed as it came from the manufacturer by the addition of a steel plate about 2½ inches square, which necessarily made it more likely to drop from its own weight or the accumulation of sawdust thereon, or be displaced by defendants' employees working near it. Defendant Wilson testi-

fied that he was informed of its alleged unsafe conditions and the danger to be apprehended therefrom, and that he advised the use of a pin as an additional fastener.

3. The evidence tends to show, however, that the pin as actually made was so short and loose in the hole, that a dropping of the plate or an accidental contact therewith by an employee would have a tendency to drive the pin out, throw the lever and start the carriage. Witness McKereghan testified that he could knock the lock down and drive the pin out so as to throw the lever by one motion of his foot. Moreover, the fastener was located at a place where the employees were compelled to work in the discharge of their duties. There were only $2\frac{1}{2}$ feet between the lever and the saw pit. In this space five or six men were required to work in removing the saw. The saw itself was 12 inches wide, so there was necessarily danger of the workmen coming in contact with the lever, displacing the lock and starting the carriage, unless the lever was safely fastened. On this evidence the court would not be justified in taking the case from the jury, and declaring as a matter of law that defendants exercised reasonable care in providing a safe fastening for the lever. Nor do we understand counsel for defendants to make any serious contention on this point. Their position is that the negligence of defendants was not the proximate cause of the injury, but it was caused by an employee accidentally or negligently coming in contact with the lever and disengaging the lock, an event for which they were not responsible. The doctrine of proximate cause in negligence cases is often difficult, and much learning has been displayed in its discussion. While there is an apparent if not real conflict in the authorities, or rather in the application of the rule to the facts of particular cases, we take the law, in any event, to be settled that a master is liable for an injury to his servant, caused by the concurring negligence of himself and fellow servant, which would not have happened had the master performed his duty: 12 Am. & Eng. Enc. Law (2 ed.), 905; *Sherman v. Menominee River Lumber Co.* 72 Wis. 122 (39 N. W. 365; 1 L. R. A. 173);

Goe v. N. P. Ry. Co. 30 Wash. 654 (71 Pac. 182); *Gila Valley, G. & N. Ry. Co. v. Lyon*, 9 Ariz. 218 (80 Pac. 337); *Siegel, Cooper & Co. v. Trcka*, 218 Ill. 559 (75 N. E. 1053: 2 L. R. A., N. S., 147: 109 Am. St. Rep. 302); *McGregor v. Reid, Murdock Co.* 178 Ill. 464 (53 N. E. 323: 69 Am. St. Rep. 332); *Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 399 (73 N. E. 787); *Armour v. Golkouska*, 202 Ill. 144 (66 N. E. 1037); *Pullman Palace Car Co. v. Laack*, 143 Ill. 242 (32 N. E. 285: 18 L. R. A. 215).

In *Sherman v. Menominee River Lumber Co.* 72 Wis. 122 (39 N. W. 365: 1 L. R. A. 173), plaintiff was injured by an edger in defendant's sawmill, which, by reason of a defect, was unnecessarily dangerous. He was working with the edger, and was injured by a plank which was thrown backward from the machinery, due to the negligence of another operator. The trial court held that plaintiff could not recover because the negligence which caused his injury was due to a co-employee. But on appeal the cause was reversed. The court said:

"We are of the opinion that the negligence of the co-employee of the plaintiff, under such circumstances, would not excuse the defendant, but would simply be negligence contributing to the injury caused by the negligence of the defendant and the co-employee, and the defendant would be liable to the plaintiff. The culpability of defendant lies in the fact that it permitted the use of a machine in doing its work, which, by reason of its defects, was unnecessarily dangerous to its employees; and it cannot excuse itself by alleging that if it had been carefully used no accident would have happened to the plaintiff."

In *Siegel, Cooper & Co. v. Trcka*, 218 Ill. 559 (75 N. E. 1053: 2 L. R. A., N. S., 147: 109 Am. St. Rep. 302), two servants of defendant were riding in an elevator. One threw the other down, so as to cause his foot to project over the floor of the elevator, and it was crushed in passing a new defectively constructed entrance. It was contended that defendant was not liable for the injury thus received, because the proximate cause was the negligent act of the servant who threw the plaintiff upon the floor of the elevator. But the court ruled that, if the defendant "was guilty of the negligence charged in the declara-

tion, and without which the injury in question would not have occurred, then it would make no difference as to its liability that some act or agency of some other person or thing, also contributed to bring about the result from which damages are claimed. Both or either of the contributing agencies were liable for the injury occasioned by their negligence, appellee being without fault, and not held to have assumed the risk involved in the improper construction."

In *McGregor v. Reid, Murdock & Co.* 178 Ill. 464 (53 N. E. 323: 69 Am. St. Rep. 332), defendant had employed competent mechanics to put in a new cable for its elevator. The contractors left the fastenings insecure and unsafe, by reason of which the cable parted, and on account of a defective safety device the elevator fell, injuring plaintiff. The defendant insisted that the imperfect fastening of the cable was the proximate cause of the injury, and that no recovery could be had against it, on account of the defective condition of the safety device. The court said:

"This position is clearly untenable. The two causes operated together, and neither alone would have caused the elevator to fall, and if the pulling out of the cables was attributed to an accident or to the negligence of a third person, and still the elevator would not have fallen without the negligence of appellee, appellee would be liable; for both causes, operating proximately at the same time, caused the injury."

In *Gila Valley, G. & N. Ry. Co. v. Lyon*, 9 Ariz. 218 (80 Pac. 337), plaintiff's intestate was killed by reason of the concurring negligence of defendant company in constructing and maintaining a spur track, and that of the conductor of the train upon which he was riding at the time of the accident. In discussing the question, the court said:

"In the case at bar it was the duty of the railroad company to have exercised reasonable care and caution to construct and maintain its spur at the place where the accident occurred, so as to guard against such accidents as might reasonably have been foreseen as liable to happen. If it failed in its duty in this respect, it was guilty of negligence, and if this negligence contributed to the accident in the sense that otherwise it would

not have occurred, then its negligence, coupled with the negligence of the conductor, in operating the train, became the proximate cause. On the other hand, if the conductor was guilty of negligence in operating the train, and this negligence, coupled with the negligence of the railroad company in the matter of the construction and maintenance of its spur, was the cause of the injury, such negligence on the part of the conductor was a concurring or co-operative cause, but not the sole cause. If the negligence of the conductor was such as would have resulted in the accident, even had the railroad company exercised due care and diligence, then the negligence of the conductor would have been not only the 'proximate,' but the 'sole,' cause of the injury, and the railroad company would not be liable. The issue raised by the pleadings and submitted was whether the accident was caused in whole or in part by the negligence of the company. The question whether the company was liable would be answered in the negative, were the jury to say that the conductor's negligence was the sole cause of the accident, for, if the sole cause, then no negligence on the part of the company could have contributed to it. The court did therefore properly charge the jury that in determining the question whether the company was liable for the injury they were to find whether negligence on the part of the company contributed to the accident, or whether it was brought about solely by the negligence of the conductor."

In *Goe v. N. P. Ry. Co.* 30 Wash. 654 (71 Pac. 182), a servant employed about machinery slipped, and in falling struck an unguarded lever, which set the machinery in motion. In endeavoring to catch himself he threw his hand against a cog wheel, which caught and ground it. It was insisted by the defendant that the injury to plaintiff was caused by an accident, for which it was in no way responsible, and it was argued that, if it had not been for the accident of falling, supplemented by the accident of striking the lever, still further supplemented by plaintiff throwing his hand in the cog, no injury would have been sustained. The court said:

"This may be conceded without settling the question of proximate cause, for it is well established that, where the primary cause of an injury is a pure accident, occasioned without fault of the injured party, if the negligent act of the defendant is a co-operating or culminating cause of the injury, or if the acci-

dent would not have resulted in the injury excepting for the negligent act, the negligence is the proximate cause of the injury for which damages may be recovered."

We conclude from these authorities that, if defendants were negligent in not providing a suitable and safe lock or fastener for the feed lever, and without such negligence the accident to plaintiff's son would not have happened, they are liable, notwithstanding the act or negligence of a co-employee may have been a concurrent or co-operating cause of the injury. It is true a master is responsible only for the result of his own negligence. To render him liable for an injury to his servant, there must be a direct causal connection between his misconduct and the injury, and the latter must be the direct result of some negligent act of the master. But he is chargeable with the natural and probable consequence of his own act, and the causal connection will be sufficient, if, according to the usual experience of mankind, the result ought to have been foreseen and provided against by him. The intervening act of a third person or other agency contributing to, and bringing about, a condition necessary to produce the injurious effect of the original negligence, will not excuse the first wrongdoer, if the intervening cause and its probable consequence be such as should have been anticipated by the latter: *Ahern v. Oregon Telephone Co.* 24 Or. 276 (33 Pac. 403, 35 Pac. 549; 22 L. R. A. 635). "The test," says the Supreme Court of Massachusetts, "is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise": *Stone v. Boston & Albany R. R.* 171 Mass. 336 (51 N. E. 1: 41 L. R. A. 794).

4. It is claimed that the accidental or negligent tripping of the lock by one of the workmen falling against the lever was a thing not likely to happen in the ordinary course of events, and it was therefore not the duty of defendants to have anticipated or provided against it. But this was a question for the jury to determine, as a matter of fact, from all the circumstances of the case. The proximate cause of an injury is generally a question for the jury. It is only when the facts and inferences

to be drawn from them are undisputed that it becomes a question for the court: *Ahern v. Oregon Telephone Co.* 24 Or. 276 (33 Pac. 403, 35 Pac. 549; 22 L. R. A. 635). There was certainly a sufficient dispute in this case as to whether according to the usual experience of mankind the lever by which the log carriage was operated was likely to be moved and the carriage accidentally started by an employee of defendant coming in contact with it, unless it was securely fastened, to render it a question of fact for the jury whether the defendants should have anticipated and guarded against such an event.

5. Counsel complain that this question was not directly submitted to the jury. But the record does not disclose that a request to do so was made by defendants, nor that an exception was saved to the court's failure in this regard, if there was any such failure. The defendants requested an instruction that, even if they were negligent as charged, they would not be liable if the injury would not have happened but for some intervening cause not produced by them, and which ordinary care on their part could not have prevented. This is not the law as we understand it. If defendants were negligent, an intervening cause or agency would not excuse them from the natural and probable result of their negligence if it was their duty to have anticipated and provided against such event, because such intervention would be a thing likely to happen in the ordinary course of events: *Lane v. Atlantic Works*, 111 Mass. 136.

6. Plaintiff testified that at the time the mill was being reconstructed he overheard a conversation between some of the employees and Mr. Mitchell, who was in charge of the reconstruction for defendants, in reference to a defect in the lever and the manner in which it was fastened, and was permitted, over the objection and exception of defendants, to relate such conversation. This evidence was, in our opinion competent. Mitchell was the representative of defendants in charge of the reconstruction of the mill, and notice to him of a defect in the lever or fastener was notice to them. We do not think the jury could have been misled by supposing from this testimony that a previous runaway of the carriage had occurred, while a lever

was in use with the same fastening as it had at the time of the injury to plaintiff's son, since the record shows that the court on motion of defendants withdrew from their consideration all testimony concerning the former runaway. It clearly appears that the conversation testified to by the witness, so far as the jury were permitted to consider, had reference to the lever used in the mill prior to defendants' purchase, and the advisability of reinstalling such lever with its then fastener.

7. The defendants called as witnesses several expert millmen, and sought to show by them that, in their opinion, the lever in use at the time of the injury complained of was provided with a reasonably safe and proper lock or fastener. The plaintiff had previously asked such a question of one of his witnesses, but on the objection of defendants, the witness was not permitted to answer. Having thus been instrumental in establishing the law of the case, it would seem that defendants could not reasonably complain because the court adhered to it throughout the trial. But, however that may be, the evidence was incompetent. It was directed to the principal issue in the case, and one which the jury were required to determine from the facts, and not from the opinions of witnesses. Models of the lever and fastener were before the jury. Its construction and operation were fully explained to them, and it required no particular skill or science to determine whether the fastener was reasonably safe. The opinion of experts was neither necessary nor competent: *Labett, Master & Servant*, § 830; *Harley v. Buffalo Car Mfg. Co.* 142 N. Y. 31 (36 N. E. 813); *Pulsifer v. Berry*, 87 Me. 405 (32 Atl. 986).

8. The testimony of the witness Trickey, that the pin used in the fastener at the time of the accident was so loose that the jar of the mill, when in operation, would work it out, and that of Bradford, that the fall of the clip would have a tendency to knock the pin out, was not of this character. It was given with reference to the models of the lever and fastener used on the trial and in explanation of the construction of such fastener, and its operation.

9. It appeared incidentally from the evidence that a fastener for the lever used by the previous owner of the mill had been removed by defendants, and the one in use at the time of the accident substituted in place thereof. In referring to the former fastener, one of the witnesses denominated it as a "farmer's rig." Counsel for plaintiff in his closing argument, in alluding to the old fastener, so designated it, but did not undertake to describe it, but called the jury's attention to the fact that it had been adopted after a previous runaway of the carriage, and that it had been removed and another substituted in its place by defendants. Counsel for defendants objected to these remarks on the ground that they were a discussion of a matter not in evidence. The court overruled the objection, for the reason that the argument "was fairly an answer to the contention of the defendants," and as the argument of defendants' counsel is not in the record, we cannot say the ruling was error.

The judgment of the court below will be affirmed.

AFFIRMED.

Decided 28 January, 1908.

MCGREGOR v. OREGON R. & N. CO.

98 Pac. 465.

EXCEPTIONS, BILL OF—AMENDMENT—NUNC PRO TUNC ORDER.

1. Where an original bill of exceptions as filed purported to contain the matters which were inadvertently omitted, the appellant, after argument of the appeal, and after notice given in the Supreme Court, was entitled to a *nunc pro tunc* order of the trial court amending the bill by inserting the omitted matter.

SAME—RECORD OF TRIAL—PRESUMPTIONS.

2. Under Sections 169-172, B. & C. Comp., relating to the record of the trial and preparation of a bill of exceptions, it is presumed that the record was kept by the court, and that the court prepared the bill of exceptions, so that an oversight in omitting matter intended to be included in the bill, is in law the error of the court, though it is the practice for the counsel to prepare and submit the bill of exceptions to the court for its approval.

CARRIERS—LOSS OF FREIGHT—ACTION—PLEA—ESTOPPEL.

3. In an action against a carrier for loss of freight, a plea of estoppel by reason of plaintiff having received the bill of lading after loss, and having forwarded it to defendant with his claim for damages, was insufficient, where it alleged no facts showing that defendant acted on the contents of the bill of lading to its prejudice, or that it was misled by anything plaintiff did with reference thereto.

SAME—FINDINGS—EVIDENCE—LIMITATION OF LIABILITY.

4. In an action against a carrier for loss of goods by fire, evidence held to support a finding that plaintiff never entered into a special contract, evidenced by a bill of lading limiting the carrier's liability.

SAME—EXECUTION AFTER LOSS.

5. Where, after loss of goods while in the possession of a carrier, it executed and sent to the shipper a bill of lading limiting the carrier's liability as a matter of convenience for the purpose of identifying the property lost, the shipper's receipt of such bill did not limit the carrier's common-law liability.

SAME—LIMIT OF LIABILITY.

6. Mere notice by a carrier to a shipper is insufficient to limit the carrier's liability, an express stipulation being necessary for that purpose.

SAME—CARRIER'S LIABILITY—WAREHOUSEMEN—DUTY OF CARRIER.

7. Where the consignee is present on the arrival of goods, he is required to receive them without unreasonable delay, or the carrier's liability as such is terminated. If the consignee is absent, but lives in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, after which he has a reasonable time to remove them; but if he is absent, unknown, or cannot be found, the carrier may place the goods in a warehouse, and after keeping them a reasonable time, if not delivered, the carrier's liability as such ceases.

SAME—REASONABLE TIME.

8. Plaintiff's agent learned of the arrival of the goods in question between 4 and 5 o'clock P. M., which was a few hours after the car in which the goods were transported reached destination. The shipping receipt had not arrived, and it was customary for the carrier's office to close at 6 P. M. Plaintiff did not remove the goods that night, during which they were destroyed by fire. Held, that the loss occurred before the expiration of a reasonable time for the removal of the goods as a matter of law.

SAME—QUESTION FOR COURT OR JURY.

9. Where the facts relating to the reasonableness of the opportunity offered to a consignee for the removal of goods after arrival are few and simple, and conclusively established, whether a reasonable time has or has not elapsed is a question for the court; it being proper to submit it to the jury only in case of a conflict in the testimony, or when the facts are doubtful or complicated, etc.

SAME—LOSS OF GOODS—DEFENSES—PLEADING.

10. A defense by a carrier that part of the goods sued for did not belong to plaintiff could not be proved where not specially pleaded.

SAME—LIMITATION OF LIABILITY—BURDEN OF PROOF.

11. A carrier being ordinarily an insurer of the goods it undertakes to transport, and all limitations of its common-law liability being in the nature of exceptions to its general responsibility, the burden is on the carrier to allege and prove a limited liability contract on which it seeks to relieve itself of its common-law liability.

TRIAL—ORDER OF PROOF.

12. Where, in an action against a carrier for loss of goods, it relied on a limited liability contract, defendant, though entitled to introduce such contract as a part of its case, had no right to introduce it as a part of plaintiff's cross-examination, or to ask plaintiff whether at any time prior to the shipment his attention was directed by the carrier's agent, or by any one, to any of the printed matter on the back of the contract.

TRIAL—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

13. Requested instructions substantially covered by the general charge are properly refused.

From Union: THOMAS H. CRAWFORD, Judge.

This is an action by L. McGregor against the Oregon Railroad & Navigation Co., to recover the value of certain household goods and bar supplies destroyed by fire, after the goods had reached their destination and before they were delivered to the consignee. From a judgment in favor of plaintiff, defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Arthur C. Spencer, James G. Wilson and W. W. Cotton*, with an oral argument by *Mr. Spencer*.

For respondent there was a brief with an oral argument by *Mr. James D. Slater*.

Opinion by MR. COMMISSIONER KING.

This is an appeal by defendant from a judgment in favor of plaintiff for \$900 damages for the loss, by fire, of certain household goods and bar supplies, used by him in the hotel business. The goods were left by plaintiff for shipment with defendant's agent at North Powder, Or., on February 9, 1906, and directed to be shipped to him at Elgin, in the county named, with the view of having them transported from there by wagon a distance of 60 miles into Wallowa County, to which place he was removing. The goods reached Elgin about noon on February 12th following, and were left in the car in which they were shipped in front of the Elgin Forwarding Company's warehouse, which, from causes unknown, took fire during the night and spread to the car near by containing plaintiff's freight, destroying the goods. It is alleged that no receipt, bill of lading or other instrument in writing was issued to the shipper thereof at the time the goods were shipped, but conceded that a few days after the fire he received a bill of lading with plaintiff's name thereon, which had been signed by the defendant's agent, who claims he was authorized to do so by plaintiff.

1. After the argument, and after notice thereof having been given in this court, counsel for defendant applied to the court below for permission to have the bill of exceptions amended

nunc pro tunc to include the bill of lading and other matters inadvertently overlooked in preparing the bill of exceptions in the first instance. After due notice of the proposed amended bill it was signed by the judge of the circuit court as of the same date as that of the first one filed. Counsel for plaintiff moves to strike this amended bill from the files, stating as a reason therefor that the lower court had no authority, power or jurisdiction to authorize the amendment in the case after the term at which the action was tried had expired, and that the application to amend shows there was no mistake made by the court in signing or approving the original bill of exceptions, and that it appears that the defect arises merely from certain matters not having been included therein, but now desired, and that the oversight was that of counsel and not of the court. In *State v. Estes*, 34 Or. 196, 205 (51 Pac. 77, 52 Pac. 571, 572, 55 Pac. 25), Mr. Justice WOLVERTON, after observing that some states, including the United States Supreme Court, have adopted a rigid rule as respects amendments to a bill of exceptions after having been filed in the appellate courts, announces as a rule of this court that: "A bill of exceptions, once settled and signed and properly filed, becomes a part of the record in the case to which it relates, and stands precisely upon the same footing as any other record," and that "if, however, a bill of exceptions, through inadvertence or mistake, has been so made up as not to fairly and truly recite or represent what it purports to show as having actually transpired during the course of the proceedings, it may, by order of the court, entered *nunc pro tunc*, upon proper notice, be so amended at a subsequent term as that it will accord with the real facts"; further stating: "We incline strongly to the more liberal practice as being better suited to subserve the ends of justice, and are therefore constrained to adopt it." Measured by the rule thus announced, and finding that the original bill of exceptions as filed purports to contain the matters included in the bill as amended, it follows that the court, in approving and signing the amended bill of exceptions, acted within its powers.

2. Nor could it be material that the oversight upon which the amended bill was sought appears to be that of the attorney. It is sufficient if it appears that the matters were omitted by the inadvertence of either the court or counsel preparing the bill: for, if omitted, it is to be presumed that the court overlooked it. Although it has become the practice, and a commendable one, for the counsel to prepare and submit the bill of exceptions to the court for its approval, yet, under Sections 169-172, B. & C. Comp., it is presumed that the court keeps the record of the trial and prepares the bill of exceptions when the case may be appealed, from which it follows that from whatever cause the oversight may have occurred, it is in law the error of the court before which the cause may have been tried, and on having its attention called thereto, after notice seasonably made to those interested, the court has power to correct the bill of exceptions so as to conform to the facts intended to be included therein. It clearly appears, however, from the amended bill presented, and the court's certificate appended thereto, that it is intended to supersede the original bill, and to include all matters to be considered here, and it will be so treated.

3. In this connection counsel for plaintiff urge that the bill of exceptions, on account of containing more than sufficient testimony to explain the errors assigned, and not having stated separately and distinctly the evidence intended to show the application of the rulings of the court, etc., does not come within the rule of this court, as required in *Hedin v. Suburban Ry. Co.* 26 Or. 155 (37 Pac. 540), and subsequent decisions on the subject. Owing to the conclusion we have reached on the merits of the controversy, a consideration of this point becomes unnecessary: *Steiger v. Fronhofer*. 43 Or. 178 (72 Pac. 693). This action is based upon the common-law liability of the defendant, which, after denying any negligence on its part, sets up four defenses: (1) Exemption from liability, in case of fire, by special contract with plaintiff; (2) that, if liable at all, it is responsible as a warehouseman only; (3) that by a contract with plaintiff its liability is limited to \$5 per hundred weight for the household goods, and 50 cents per gallon for the liquors

shipped, and that prior to the shipment the rates under which the goods were shipped had been established by the defendant for their transportation upon the character and value thereof, a higher rate being charged for goods shipped at the risk of the carrier, and a lower rate for goods shipped at the risk of the consignee; (4) estoppel by reason of plaintiff having subsequently received the bill of lading, and having forwarded it to defendant, with his claim for damages. The defense of estoppel was stricken out on motion of plaintiff as being sham, frivolous, redundant and surplusage; but the other defenses were put in issue by the reply. It is urged first that the court erred in striking out the plea of estoppel. An examination of the averments discloses no facts alleged in support thereof, except such as might have been established under the other defenses relied upon. Again, the plea, as given, contains no allegation of facts showing that defendant acted upon the contents of the receipt or bill of lading to its prejudice, or that it was in any manner misled by anything done by plaintiff in reference thereto, all of which were essential to estop plaintiff from asserting his claim against the company: *Haun v. Martin*; 48 Or. 304 (86 Pac. 371).

4. There is also testimony tending to show that plaintiff received no receipt, bill of lading or other instrument from defendant until after the fire; that the shipment was made with no understanding between them in reference thereto or as to the contents thereof, all of which was submitted to and passed upon by the jury, as to which facts their verdict is conclusive. And there is testimony from which it could reasonably be inferred that the bill of lading was first wanted by the plaintiff and his agent in order that, by furnishing a means of identification thereof, they could more conveniently procure the goods from the agent at Elgin, and that it was not forwarded to that point until after the loss occurred. McGregor denies ever signing the instrument, and his testimony is broad enough to indicate that no authority was given to any one else to affix his name thereto. When he presented to the company his claim for the loss, he sent no bill of lading, nor did he state upon

what theory his claim was based—whether upon the common-law liability of the company as a common carrier, or upon the special and written contract. So far as disclosed by the record, this shipping receipt was sent to the company as a matter of convenience for the purpose of identifying the property lost. On receipt of the demand for damages from plaintiff's attorney the company requested that the shipping receipt be sent in conformity with their rules in such cases, and it was evidently sent under this request. The claim was disallowed by the company, the receipt returned to plaintiff's attorney, and this action brought, not under the special contract here relied upon by the company, but upon its common-law liability. In this respect this case is unlike those cited by appellant, where the actions were brought upon the contract disclosed by the receipts, bill of lading, etc., and where an attempt is made at the trial to shift the character of the claim. It will be observed in the cases cited, in which this question was fully considered, that the shippers received their bills of lading at the time of the shipment, and not after the loss, as in this case, and that when so received they either expressly or impliedly ratified the contents thereof. There is evidence sufficient to support the findings of the jury to the effect that plaintiff never entered into the special contract claimed through the shipper's receipt, commonly known as the bill of lading, and the mere fact that he received it after the loss cannot avail defendant anything. There is a vast difference between consenting to the terms expressed in a bill of lading before the shipment, if such consent can be implied from the mere fact of receiving it without the signature of the consignor, and a case like the one at bar, where the jury has found that there was no consent to receive the bill of lading at some future time, nor to make the contract included therein.

5. Many authorities hold that the acceptance of such receipt after the loss cannot be taken advantage of by the carrier, and that the shipper under such circumstances is not estopped from asserting his claim against the carrier under its common-law liability, among which are: 6 Am. & Eng. Ency. Law (2 ed.), 642; *Baltimore & O. R. Co. v. Doyle*, 142 Fed. 669 (74 C. C. A.

245); *Gott v. Dinsmore*, 111 Mass. 45; *John Hood Co. v. Am. P. S. Co.* 191 Mass. 27 (77 N. E. 638); *Bostwick v. Balt. & O. R. Co.* 45 N. Y. 712; *American Ex. Co. v. Spellman*, 90 Ill. 455; *Phoenix Powder Mfg. Co. v. Wabash R. Co.* 101 Mo. App. 442 (74 S. W. 492); *Allen, etc., Co. v. Can. Pac. Ry. Co.* 42 Wash. 64 (84 Pac. 620).

6. Under the verdict of the jury we must presume that plaintiff neither consented nor authorized his name to be signed to this receipt, and under the rule as substantially stated and recognized in this State in *Seller v. Steamship Pacific*, 1 Or. 409 (Fed. Cas. No. 12,644), nothing short of an express stipulation will constitute such an agreement. It cannot depend upon implication or inference, nor conflicting and doubtful evidence, and mere notice to the shipper must be held insufficient. In that case the shipper, at the time of the delivery of the goods for transportation, and before they were transported, was handed a shipping receipt for the goods, which consisted of looking glasses, valued at \$450, and the receipt received by the owner thereof contained the words "not accountable for contents." This receipt the owner of the goods accepted without signing, and without being requested to do so, which fact was relied upon by the company as a defense in a suit brought by the owner for the recovery of the value of the goods which were injured in transportation, it being claimed as such defense that, under the law, it was the custom for the company to ship goods in this manner without the signatures of both parties thereto, and that this released the company from liability thereon; but in discussing this feature Mr. Justice DEADY says:

"The law, and not such a custom, ascertains and determines the rights and liabilities of shippers and common carriers. Such pretenses of custom as this appears to be, if allowed to modify the law of the land, would place it in the power of common carriers to make and unmake the law as they choose. I conclude, therefore, that these words, 'not responsible for contents,' amount to nothing, and in no way affect the rights of the shipper or the liability of the carrier. This being the case, and it appearing that the goods were 'received in good order,' the burden of proof lies on the carrier to show that the injury to the goods arose from the only exceptions to his liability. * * "

7. It is urged that, since the defendant had landed the goods at Elgin, and informed plaintiff's agent (Beals) that they were there and ready for delivery, and the latter, as agent of the plaintiff, had not removed them on the evening of the receipt of the notice, defendant thereafter became liable, if at all, as a warehouseman only. In this connection defendant claims that it was customary in that locality for defendant to unload from the cars on the track the goods of this class shipped to that point, which cars were usually placed in a certain locality for that purpose, and became what is known as "spotted," meaning that the car with its contents was thus placed preparatory to having the goods delivered therefrom, and that after the car reached its destination and was "spotted," and plaintiff's agent was apprised of these facts, the car, as a matter of fact, as well as of law, became a "warehouse on wheels," by reason of which it is maintained that its liability as a carrier then terminated. But whether the car became a warehouse as indicated or not the responsibility of defendant as a carrier continued until after the goods reached their destination and were either unloaded into a warehouse, or left in some other place equivalent thereto, and until plaintiff or his agent had a reasonable time to call for, examine, and remove them. "There is an irreconcilable conflict in the authorities," says Mr. Justice WOLVERTON, in *Normile v. Oregon Nav. Co.* 41 Or. 177, 182 (69 Pac. 928), "as to when the duties of a common carrier cease and those of a warehouseman begin, where freight is carried to its destination, and unloaded, and put in a place usual and convenient for its reception by the shipper. Many of the authorities hold that the shipper must have a reasonable time after the arrival and deposit thereof in which to receive and take it away; some requiring notice to the shipper also, while others relieve the carrier at once upon the safe deposit and storage at the usual place, the same being convenient for its reception by the shipper." The owner of the property shipped should undoubtedly have the right, if he chooses, of preventing his goods from remaining stored in a warehouse subject to the warehouseman's liability only as such, and, unless the carriers can announce the

exact time when the goods will reach their destination, this would be impossible. That much uncertainty always exists in this respect is universally recognized, and to insist that the consignee must be on hand at the precise moment of the arrival of his cargo, which might require days, and in some instances weeks, of constant waiting and watching at the depot, is, in effect, to force upon him what he should clearly be permitted to avoid by the use of reasonable diligence. The enforcement of the rule invoked by the defendant would make these unreasonable requirements of the shipper or consignee necessary, in order to avoid the extra risk of a probable loss that might occur in a warehouse, even if such loss should occur within an hour after the cargo is unloaded and placed there. And, as stated by Mr. Justice COOLEY, in *McMillan v. M. S. & N. I. R. Co.* 16 Mich. 79, 103 (93 Am. Dec. 208), cited with approval in *Walters v. Detroit U. Ry.* 139 Mich. 303, 305 (102 N. W. 1037): "To require the consignee to watch from day to day the arrival of trains, and to renew his inquiries respecting the consignment, seems to me to be imposing a burden upon him without in the least relieving the carrier. For it can hardly be doubted that it would be less burdensome to the carrier to be required to give notice than to be subjected to the numberless inquiries and examinations of his books, which would otherwise be necessary, especially at important points." In order, therefore, to avoid this burden, and at the same time impose diligence upon both the shipper and carrier without inconvenience to either, we find the weight of authority recognizes certain rules governing the delivery of the goods at their place of destination by the common carrier, which may be summarized as follows: If the person to whom the goods are shipped is present upon the arrival thereof, he must take them without unreasonable delay; if he is absent, but lives in the immediate vicinity of the place of delivery, the carrier should notify him of the arrival of the goods, after which he has a reasonable time to take and remove them; while, if he is absent, unknown, or cannot be found, then the carrier may place the goods in some warehouse, and, after keeping them a reasonable time, if the

owner does not call for them, its liability as a common carrier ceases, but if, after the arrival, the consignee has a reasonable opportunity to remove them, and does not, he cannot hold the carrier as an insurer. The liability of the common carrier thus applied and limited we believe to be consonant with public policy, and sufficiently convenient and practicable. Among the authorities in support of this position are: *Moses v. Boston & Maine Ry. Co.* 32 N. H. 523 (64 Am. Dec. 381); *Walters v. Detroit United Ry. Co.* 139 Mich. 303 (102 N. W. 745); *Hicks v. Wabash R. Co.* 131 Iowa, 295 (108 N. W. 534: 8 L. R. A., N. S., 235); *L. L. & G. R. Co. v. Maris*, 16 Kan. 333; *Mo. Pac. Ry. Co. v. Grocery Co.* 55 Kan. 525 (40 Pac. 899; *Nor-mile v. Nor. Pac. Ry. Co.* 36 Wash. 21 (77 Pac. 1087: 67 L. R. A. 27); *Burr v. Adams Ex. Co.* 71 N. J. Law, 263 (58 Atl. 609); *Winslow v. Vt. & Mass. R. Co.* 42 Vt. 700 (1 Am. Rep. 365); *Wood et al. v. Crocker*, 18 Wis. 345 (86 Am. Dec. 773).

8. But it is insisted by counsel for defendant that the question as to whether a reasonable time had elapsed after the arrival of the goods in which to permit plaintiff or his agent to remove them is, under the undisputed facts presented, one for the court and not for the jury to determine, and that the court erred in submitting the question to the jury. The rule on this point is clearly, concisely, and, we think, correctly, stated in *Lenke v. Chicago, M. & St. P. Ry. Co.* 39 Wis. 449, 455, in which the court say:

"The rule doubtless is that, whenever there is a conflict of testimony in respect to material facts bearing upon the question, or when the facts are doubtful or complicated and the court cannot satisfactorily determine their weight or importance, the question as to whether a reasonable time has or has not elapsed should be submitted to the jury, under proper instructions. But when, as in this case, the facts relating to the question are few and simple, and are conclusively established by a special finding, or by the undisputed evidence, it is for the court to say whether a reasonable time has or has not elapsed for the performance of a given act."

In the case before us it is disclosed by the evidence that the plaintiff's agent learned of the arrival of the goods between the

hours of 4 and 5 o'clock p. m., which was a few hours after the car in which the goods were transported reached Elgin; that the shipping receipt had not arrived; that it was customary for the office to close at the hour of 6; and that, after considering these facts, he decided to wait until morning.

9. It becomes unnecessary, therefore, to determine here whether the question of the reasonableness of the time in this instance should have been submitted to the jury, for, if the question was properly submitted to the jury, they have found adversely to defendant, and their decision thereon is not, under the testimony, subject to review; but if, on the other hand, it is a question for the court's determination, it appears from the evidence that, after the arrival of the car, the time was so short in which the goods could have been delivered, together with the lateness of the hour when plaintiff's agent was informed of the arrival thereof, that the court, under such circumstances, would have been impelled to hold that the loss occurred before the expiration of the reasonable time to which plaintiff was entitled in which to remove the property, and it would have been imperative upon the court so to instruct the jury, leaving no change in the result. It is clear, therefore, that defendant is in no position to complain in this respect.

10. It is next insisted that the court erred in sustaining the objections to the interrogatories tending to show that a part of the goods lost were not the property of plaintiff. Defendant makes no attempt to plead that plaintiff is not the real party in interest. Such defense must be specially pleaded, in the absence of which, testimony of the character offered on this point is inadmissible; and no error was committed in sustaining the objection thereto. *Overholt v. Dietz*, 43 Or. 194 (72 Pac. 695).

11. It is maintained that the court erred in not permitting the defendant to introduce the bill of lading in evidence on cross-examination of plaintiff, and in not permitting him to ask the plaintiff on cross-examination whether at any time prior to the shipment his attention was directed by the agent of the Oregon Railroad & Navigation Company, or by any one, to any of the printed contents on the back of the receipt, which was

received by him after the fire. The point intended to be raised by the bill of lading or receipt was that it constituted a special contract between the parties releasing the defendant from liability as an insurer, and for this purpose was at the proper time admissible in evidence: *West v. Washington & C. R. R. Co.* 49 Or. 436 (90 Pac. 666, 671). A common carrier is ordinarily considered and treated as an insurer of the goods it undertakes to transport, and all limitations of the common-law liability are in the nature of exceptions to its general responsibility, from which it follows that, in order to avoid such liability, and rely upon a limitation contract, it devolves upon the carrier both to allege and prove it: *Normile v. Oregon Nav. Co.* 41 Or. 177 (69 Pac. 928).

12. This being an affirmative defense, and the burden of proof in this respect being upon the defendant, it follows that to have permitted him to go fully into this question on cross-examination would thereby have enabled him to have procured the advantage by prematurely making the witness his own, and at the same time, under the pretense of cross-examination, of depriving plaintiff of any cross-examination on the points thereby elicited. The court properly sustained the objection to this method of procedure: *Hildebrand v. United Artisans.* 50 Or. 159 (91 Pac. 542).

13. A number of errors are assigned on account of instructions requested by defendant and refused by the court; but on examination we find the substance of the instructions requested, except to direct a verdict, were included in those given. Defendant was accordingly not prejudiced by the refusal to give the instructions in the form asked.

We find no error in the record detrimental to defendant, from which it follows that the judgment of the circuit court should be affirmed.

AFFIRMED.

Argued 7 January, decided 28 January, rehearing denied 17 March, 1908.

DECHENBACH v. RIMA.

98 Pac. 464.

TENDER—PAYMENT INTO COURT—CONDITIONAL TENDER—WITHDRAWAL.

1. Where, in forcible entry and detainer, defendant answered that he had tendered plaintiff \$115 on July 1, 1903, and a like amount on August 1 of the same year, as rent for those months pursuant to an alleged oral contract for a lease, and that he brought said sum into court and deposited it with the clerk for plaintiff, he could not thereafter claim that the tender was conditional only as a part payment on the oral contract, and having paid the money into court, could not withdraw it without plaintiff's consent.

SAME—RIGHT TO UNCONDITIONAL TENDER.

2. Where defendant paid money into court for rent already earned under an alleged parol contract for a lease, the tender being unconditional, plaintiff was entitled to the money whether defendant was successful in enforcing the alleged parol contract for a lease or not.

From Multnomah: ARTHUR L. FRAZER, Judge.

Statement by MR. JUSTICE EAKIN.

This is an appeal from an order of the circuit court directing the clerk of that court to pay to the plaintiff \$230, tendered by the defendant, and deposited in court with his answer in the case. The proceeding was a forcible entry and detainer action, commenced in the justice's court to oust defendant from certain property occupied by him as a saloon, possession of which he claimed under a parol agreement for a three years' lease. By his answer defendant alleged that he had tendered to plaintiff \$115 on July 1, 1903, and a like amount again on August 1st of that year, as rent for those months, pursuant to such alleged lease, and that he "now brings the same, viz., \$230, in like coin, into court, and deposits it with the clerk for the plaintiff, and with the above entitled court for the plaintiff." The cause was taken by appeal to the circuit court, and from that court to the supreme court, where plaintiff recovered final judgment for the property against the defendant: *Dechenbach v. Rima*, 45 Or. 500 (77 Pac. 391, 78 Pac. 666). After the mandate from the supreme court was entered in the circuit court, that court, upon the motion of plaintiff, made an order requiring the clerk to pay such deposit, viz., \$230, to the plaintiff, from which order defendant appeals. For the issues in the action, see the opinion

on the former appeal. The lease under which defendant's predecessor (Lake) occupied the premises expired July 1, 1903, and prior thereto on June 25th plaintiff served notice on Lake and the defendant to quit, and the complaint in this action was filed August 11, 1903.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. George J. Perkins*.

For respondent there was a brief and an oral argument by *Mr. Wirt Minor*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. Defendant's answer, in which he tenders the money into court, was filed August 29, 1903, and his contention is that the tender was only a conditional tender as part payment upon the parol contract; but it is not so alleged. Plaintiff's right of recovery under the forcible entry and detainer action depends upon the conditions as they existed when the complaint was filed, and it was based upon the expiration of Lake's lease and the notice to quit, served June 25th, and had no reference to nonpayment of rent by either Lake or defendant. If the circumstances under which the parol lease was made constituted an estoppel, it was such without reference to the tender of the rent money, because the court in a forcible entry and detainer action can only determine plaintiff's right to immediate possession, and cannot decree specific performance or adjudicate defendant's rights otherwise than as affecting the plaintiff's right of possession at the time of the filing of his complaint. But at the time defendant filed his answer he had had the possession of the premises two months, lacking two days, and in effect admits that he owes for these two months, and by the answer deposits the money for the plaintiff. This had the effect of placing the money in the custody of the law, and defendant cannot withdraw it without the consent of plaintiff. It does not stand in the position of a tender of purchase money made contingent upon acquiring title in a suit for the specific performance of the sale of real estate.

2. This is money apparently already earned, and tendered unconditionally, and plaintiff's right to it does not depend upon whether defendant is successful in enforcing the parol contract. Where an unconditional tender of money is made by a party, and the same deposited in court, the money is the property of the party for whom it is so tendered: *West Portland Park Ass'n v. Kelly*, 29 Or. 412 (45 Pac. 901); *O. R. & N. Co. v. Oregon R. E. Co.* 10 Or. 444.

Therefore there is no error in the order of the court, and the same is affirmed.

AFFIRMED.

Decided 28 January, 1908.

BECKWITH v. GALICE MINES CO.

98 Pac. 458.

LARCENY—FALSE PRETENSES—DISTINCTION.

1. Where possession of personal property is obtained from the owner by fraud, trick, or device, and the owner intends to part with both possession and the title when he surrenders control of the property, the offense is obtaining property by false pretenses; but if the possession is fraudulently secured, and the owner does not intend to part with the title, the offense is larceny.

CORPORATIONS—STOCK—"CERTIFICATE OF STOCK."

2. A certificate of stock is the written evidence of the right of a party to a *pro rata* share of the net profits of a corporation when declared, or to a like share of the assets after payment of its debts in case of dissolution of the corporation. Such certificates are not negotiable, but the owners may be estopped to assert title as against *bona fide* purchasers for value without notice.

SAME—TITLE—BONA FIDE PURCHASER—ESTOPPEL.

3. Plaintiff, pursuant to a contract for the sale of certain mining stock, sent the certificates containing a power of transfer, duly signed to a bank designated by the seller, with instructions that it should collect a draft attached for the price, and then deliver the certificates to the buyer. The bank was in fact a mere pretended institution, organized by the buyer to promote his criminal operations in securing possession of unlisted securities without paying therefor. The bank, without authority, delivered the certificates to the buyer, who immediately sold the stock for less than its value, and the stock after several transfers came into hands of defendants, who were *bona fide* purchasers for value. *Held*, that as plaintiff's intention was to transfer the title to the stock, and his voluntary act in delivering the stock to the bank, with the power of attorney executed in blank, thereby permitting the buyer to perpetrate the fraud, plaintiff was estopped to deny defendant's ownership.

From Multnomah: JOHN B. CLELAND, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit to enjoin the transfer on the books of a cor-

poration of certain shares of stock, evidenced by certificates, and to secure a surrender thereof. The complaint sets forth some of the facts hereinafter detailed, and alleges *inter alia* that the plaintiff at all the times stated herein was the owner of the stock mentioned, which was stolen from him and carried away by some person unknown to him, and that he had never received any compensation therefor. The defendant, the Galice Consolidated Mines Co., a corporation, which issued the stock, and the defendants, A. B. Cousin and Milton Weidler, who, at the days specified, were respectively the manager and secretary of the company, having no interest in the result of the suit, did not controvert the facts stated in the plaintiff's primary pleading. J. H. Pickart, H. A. Combs and the Harry S. Lewis & Co., a corporation, by leave of court, were made parties defendant, and jointly answered, denying the material allegations of the complaint, and averring in effect that they were severally the owners of the stock mentioned, which each purchased in good faith for a valuable consideration, and without any notice of the plaintiff's rights to or interest in the property. The reply denied the allegations of new matter in the answer, and the cause coming on for trial, the parties stipulated the facts, in substance, as follows: The plaintiff, J. S. Beckwith, is a broker, doing business at Pendleton, Or., under the firm name of J. S. Beckwith & Co., and dealing in unlisted mining stocks. The defendant mining company prior to October 10, 1905, issued two certificates of its stock to Robert C. Yenney, for 10,000 shares each, and one certificate to E. D. Gaynor, for 5,000 shares, in which vouchers it is stated that they were transferable on the books of the corporation only by the holder thereof in person, or by his attorney, upon a surrender of the certificate, properly indorsed. These certificates were transferred to the plaintiff by the persons to whom they were issued, but as the assignments are identical, except as to the name of the person subscribed thereto, only one indorsement will be given, to wit:

"For value received, ——— hereby assign and transfer unto ——— shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint

—— to transfer said stock on the books of the within named corporation, with full power of substitution in the premises.

Dated ——, 190—.

[Signed] Robert C. Yenney.

In presence of

[Signed] L. Y. Keady.”

Prior to October 12, 1905, one H. Levy had been dealing in such stock at Chicago, Ill., and his name then appeared in a list of persons engaged as brokers in that city, at which time he notified the plaintiff that his offer to sell 25,000 shares of the Galice Consolidated Mines Co. at $5\frac{1}{2}$ cents per share was accepted, whereupon he directed that the certificates, properly indorsed, should be sent to the Garfield Bank of Chicago, with instructions to hold the stock until the money stipulated should be paid. The plaintiff thereupon, without making any other indorsements of the certificates, placed them in an envelope, to which was attached a bill of exchange drawn on Levy, payable at five days' sight to the order of the First National Bank of Pendleton, Or., for \$1,437.50. The following address: “Mr. H. Levy, Chicago, Ill., care of Garfield National Bank (examination permitted),” was written on the envelope, which, with its contents, was delivered to the Pendleton bank to forward by mail as indicated. The cashier of the Pendleton bank wrote to the Garfield National Bank of Chicago as follows: “I inclose herewith for collection and return our regular No. 38,529. No protest. H. Levy. \$1,437.50”—and placed the letter and the envelope so delivered in another wrapper, which was addressed and forwarded by mail to the Garfield National Bank, Chicago, Ill. Soon thereafter the plaintiff received from Levy a telegram, which, omitting the immaterial parts, is as follows:

“Stock not at Garfield Bank. If you mailed it to Garfield National Bank, notify postmaster by mail to deliver it to the Garfield Bank, 56 Fifth avenue. Postmaster will not recognize instructions by wire. There is no Garfield National Bank. Wire answer.”

Upon the receipt of this message the Pendleton bank, complying with the plaintiff's request, instructed the postmaster at

Chicago to deliver the envelope containing the papers specified, as thus directed by Levy. The Garfield Bank was not organized as a banking corporation, and never did any legitimate banking business; but Levy, or one George R. Neville, had procured its name to be inserted in the Rand-McNally Bankers' Directory, with address as 1028 E. Garfield boulevard, in order to advance their fraudulent schemes. The Garfield Bank is a pretended institution, and as such was conducted by Levy, Neville and others to promote their criminal operations in securing possession of unlisted mining stocks which they disposed of without making any returns in money therefor. The plaintiff, prior to October 12, 1905, had never done any business with Levy or his associates; nor did he know either of them, or such simulated bank, or their method of doing business. The Garfield Bank, upon the receipt of the envelope mentioned, and without any authority therefor, delivered the certificates to Levy, who sold all the stock in question to brokers at prices not exceeding two cents per share; and neither he, his associates nor the bank ever made any payment therefor, or accounted in any manner for the certificates. The method whereby the plaintiff was deprived of the stock was practiced by Levy and Neville prior thereto in dispossessing many other persons of like property. Levy, in November, 1905, was arrested and held under an indictment, which charged him with using the United States mails for fraudulent purposes, and Neville, to escape apprehension, left Chicago, and is a fugitive from justice. The stock in question, after several transfers, was purchased by the defendants: J. H. Pickard, 10,000 shares for \$325; H. A. Combs, 5,000 shares for \$162.50; and the Harry S. Lewis & Co., a corporation, 10,000 shares for \$300. Each of the defendants last named was a *bona fide* purchaser of the stock for value, and obtained a certificate therefor, relying upon the authority conferred by the assignment and power of attorney, and each secured such property without notice or knowledge of any claim thereto on the part of the plaintiff. Based on these facts, which in a more extended form the court adopted as its findings, the temporary injunction that had

been issued was dissolved, and the suit dismissed, from which decree the plaintiff appeals. **AFFIRMED.**

This case was submitted on briefs under the proviso of Rule 16: 50 Or. 580.

For appellant there was a brief over the names of *Mr. James A. Fee, Mr. L. B. Reeder and McCourt & Phelps.*

For respondent there was a brief over the name of *Mr. Harry K. Sargent.*

MR. JUSTICE MOORE delivered the opinion of the court.

1. It is contended by plaintiff's counsel that the mode adopted by Levy to secure possession of the stock constitutes larceny whereby no title passed by his delivery of the certificates to the persons from whom the defendants, answering herein, obtained them, and hence an error was committed in dismissing the suit. In support of the doctrine thus maintained two decisions of this court are cited. In *State v. Skinner*, 29 Or. 599 (46 Pac. 368), the defendant was indicted for the crime of larceny by bailee. At his trial evidence was introduced tending to show that, as an agent of a building and loan association, the defendant falsely represented to one R. B. Dixon that, in order to secure a loan of money from his principal, the applicant, as a condition and guaranty of good faith, was required to advance 1 per cent of the sum desired, \$10 of which was to be paid for procuring and examining an abstract of the title to the farm land offered as security, if the loan was approved, and the remainder to be credited on the note given as evidence of the indebtedness; but if the application for the loan was rejected, the money so paid was to be returned. Dixon thereupon applied for a loan of \$10,000, and gave the defendant \$100, which the latter converted to his own use. A judgment of conviction having been rendered, the defendant appealed; his counsel maintaining that the evidence was insufficient to establish the existence of any trust relation between the defendant and Dixon, and hence the trial court erred in refusing to direct a verdict of acquittal as requested. In affirming the judgment it was held

that the evidence was sufficient to show that Dixon parted with the title to the money advanced only in case a loan was made, and for that reason the testimony was sufficient to warrant a conviction. In deciding that case an excerpt from the opinion of Mr. Justice CATON, in *Welsh v. People*, 17 Ill. 339, is taken in distinguishing between simple larceny and larceny by bailee as follows:

"Where * * the alleged larceny is perpetrated by obtaining the possession of the goods by the voluntary act of the owner under the influence of false pretenses and fraud, * * there is no real difficulty in deducing the correct rule by which to determine whether the act was a larceny and felonious, or a mere cheat and swindle. The rule is plainly this: If the owner of the goods alleged to have been stolen parts with both the possession and the title to the goods to the alleged thief, then neither the taking nor the conversion is felonious. It can but amount to a fraud. It is obtaining goods under false pretenses. If, however, the owner parts with the possession voluntarily, but does not part with the title, expecting and intending that the same thing shall be returned to him, or that it shall be disposed of on his account, or in a particular way, as directed or agreed upon, for his benefit, then the goods may be feloniously converted by the bailee, so as to relate back and make the taking and conversion a larceny. The pointed inquiry in such a case must always arise, did the owner part with the title to the thing, and was the legal title vested in the prisoner? If so, he was not guilty of larceny."

The other case is *State v. Ryan*, 47 Or. 338 (82 Pac. 703: 1 L. R. A., N. S., 862), in which the defendant was charged with the crime of larceny. At his trial testimony was introduced tending to show that pursuant to his fraudulent representations he induced one John F. Roth to deliver to him \$2,000 as evidence of responsibility to hold a sum of money claimed to have been staked on a trial of human speed, which proved to be a fake race. The court thereupon charged the jury *inter alia* as follows:

"So you are to consider whether or not this whole transaction was a mere scheme or device to steal Roth's money."

An exception having been taken to such language, it was contended by defendant's counsel, on an appeal from a judgment of conviction, that an error was thus committed. In affirming the judgment, a part of the opinion of Mr. Justice CATON (*Welsh v. People*, 17 Ill. 339), is again quoted, and it was ruled that, if the possession of the money was obtained by fraud, trick or device, and the owner intended to part with the title when he surrendered the control, the offense, if any, was obtaining money under false pretenses, but that, though the possession might have been secured in the manner last indicated, yet, if the owner did not intend to part with the title, the crime was larceny, and hence the instruction was a correct statement of the law applicable to the facts involved.

2. The elementary proposition thus announced is undoubtedly controlling in the case at bar, and the question to be considered is, whether or not the delivery of the certificates to the Garfield Bank of Chicago, manifests an intention on the part of the plaintiff to dispose of the title to the property, or evinces such conduct, on his part, as to estop him, as is alleged in the answer, from asserting any right to the stock as against the parties who purchased it in good faith, for a valuable consideration, and without any notice or knowledge of the means adopted to effectuate the transfer. A certificate of stock is the written evidence of the right of a party to a *pro rata* share of the net profits of a corporation when declared, or to a like share of all its property, after the payment of its debts, in case of a dissolution of the artificial being. Such certificates are not negotiable instruments; but the owners thereof have frequently been held to have been estopped to assert any title thereto as against *bona fide* purchasers thereof for value, without notice of the rights of prior holders. This rule is founded upon the principle that, when the owner of corporate stock voluntarily delivers to another a certificate evidencing a right to participate in the profits or property of a corporation, indorsed in blank, but containing all the indicia of ownership of the property, he is estopped to assert a title thereto as against a person, who in good faith and for value, purchased the certificate from the apparent

owner, relying upon the written assignment. The reason advanced for this rule is thus stated by a text-writer:

"In view of the custom by which certificates indorsed in blank are transferable from hand to hand, like negotiable paper, the owners of such certificates should be required to use the utmost care and diligence in their safe keeping. If a *bona fide* purchaser should be deceived through any negligence or want of diligence in this respect, justice requires that the owner should suffer the loss": Morawetz, Priv. Corp. (2 ed.), § 190.

As supporting the text quoted, the case of *Shattuck v. American Cement Co.* 205 Pa. St. 197 (54 Atl. 785: 97 Am. St. Rep. 735) affords a good illustration. In that case the plaintiff secured a title to certain certificates of stock, issued by the defendant to another, and delivered to him with an assignment and power of attorney indorsed thereon in blank. Without surrendering the certificates and obtaining others in lieu thereof, or filling the blank spaces in the indorsement, the plaintiff took the certificates to brokers with whom he had been accustomed to deal. The certificates, inclosed in an envelope on which the plaintiff's name was written, were placed in a pocketbook in a safe in which the brokers were in the habit of keeping securities belonging to their customers. One of the brokers, without authority from or knowledge of the plaintiff, took the certificates from the wrapper and pledged them to a bank as collateral security for a *bona fide* loan of money, made to him in the name of his firm, without notice of any interest of the plaintiff therein. Default having been made in the payment of the sum lent, the bank sold the certificates to third parties, whereupon a suit was instituted to enjoin the defendant from transferring on its books such certificates and issuing others in place thereof. The relief sought was granted by the lower court, but on appeal, the decree was reversed, the court holding that the rights of a *bona fide* holder as against the true owner of the stock to whom the apparent owner had sold or pledged it, do not depend on a negotiable character of the certificates, but rest on the principle that, where one has conferred upon another by a written transfer all the indicia of ownership of property, he is

estopped to assert title to it as against a third person, who has in good faith purchased it for value from the apparent owner. So, too, in *McNeil v. Tenth National Bank*, 46 N. Y. 325 (7 Am. Rep. 341), it was held that, where the owner of bank stock delivers to his brokers, to secure a balance of account, certificate of shares, indorsed with blank assignment, and irrevocable power of transfer, and the brokers without his knowledge pledge the shares with other securities for advances, one who pays the advances at the brokers' request, and in good faith receives from them the certificates and other securities, is entitled to hold the shares as against the owner for the full amount of the advances remaining unpaid, after the other securities are exhausted. In deciding that case Mr. Justice RAPALLO, speaking for the court, says:

"It must be conceded that, as a general rule, applicable to property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he has. But this is a truism, predicable of a simple transfer from one party to another where no other element intervenes. It does not interfere with the well-established principle that, where the true owner holds out another, or allows him to appear, as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing as against them the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

To the same effect see, also, 26 Am. & Eng. Enc. Law (2 ed.), 879; 10 Cyc. 631; *Brittan v. Oakland Bank*, 124 Cal. 282 (57 Pac. 84; 71 Am. St. Rep. 58); *Walker v. Detroit Transit Ry. Co.* 47 Mich. 338 (11 N. W. 187); *Mount Holly, etc., Co. v. Ferree*, 17 N. J. Eq. 117; *Pennsylvania R. Co.'s Appeal*, 86 Pa. St. 80; *Wood's Appeal*, 92 Pa. St. 379 (37 Am. Rep. 694); *Burton's Appeal*, 93 Pa. St. 214.

3. In the case at bar the Garfield Bank of Chicago was evidently organized to promote the fraudulent practices of Levy

and his associates, who knew that certificates of stock, assigned in blank, would not in all probability be sent to strangers as intending purchasers. The insertion in a bankers' directory of such pretended institution would allay suspicion, and give color to Levy's apparent honesty, when he requested the plaintiff to send the certificates to that bank, properly indorsed, to be held until the consideration agreed upon had been paid. The First National Bank of Pendleton, instead of mailing the certificates to its regular correspondent in Chicago, which would undoubtedly have been done except for the plaintiff's request, obeyed his direction, and sent the papers, and ultimately caused the postmaster of that city to deliver them to the simulated bank. That the scheme throughout was the rankest kind of fraud will be admitted. The plaintiff, however, voluntarily made such bank his agent, clothed with apparent authority, and surrendered possession of the certificates with the intent that the title to the stock should be transferred to Levy, and the only breach of the agreement consists in his failure to pay the consideration which he had promised for the stock. The facts herein are not the same as in *State v. Skinner*, 29 Or. 599 (46 Pac. 368), or in *State v. Ryan*, 47 Or. 338 (82 Pac. 703: 1 L. R. A., N. S., 862), for in such cases the title to the money, the possession of which was delivered to the respective defendants, was never expected to pass to them.

It was the plaintiff's voluntary act that made it possible for the defendants, answering herein, to rely upon the apparent ownership of the stock, evidenced by the assignment and irrevocable power of attorney executed in blank, and as a consequence of such belief, to expend their money without notice of any adverse right in or title to the stock. The plaintiff's intention to transfer the title to the stock, and his conduct in relation thereto, estop him, and bring the case within the rule that, when one of two innocent persons must necessarily sustain injury by the fraudulent act of a third party, he who first trusted such party, and placed in his hands the means of committing the wrong, must bear the loss. .

The decree is therefore affirmed.

AFFIRMED.

Argued 18 March, decided 16 April, 1907.

GILLETT v. DODGE.

89 Pac. 741.

CORPORATIONS—AGREEMENT OF ORGANIZERS—WEIGHT OF EVIDENCE.

Where plaintiff, defendants, and others holding an option on mining property, transferred it to a corporation formed by them, taking stock according to their interest in the option, and, the option expiring, defendants purchased the property on their own account, evidence in a suit to compel a conveyance to the corporation, held to show that it was agreed between the holders of the option, that the price of the property should be paid by the corporation, and not that plaintiff and defendants should pay for the property with their own funds, and defendants would not be required to convey to the corporation in payment of their stock.

From Lane: JAMES W. HAMILTON, Judge.

Suit by E. F. Gillett against W. H. Dodge, C. Runyard and the Sunset Gold Hill Mining Co., resulting in a decree for defendants, from which this appeal is taken. . . . AFFIRMED.

For appellant there was a brief and an oral argument by Mr. *Lark Bilyeu*.

For respondents there was a brief over the name of *Woodcock & Potter*, with an oral argument by Mr. *Edwin O. Potter*.

PER CURIAM. This is a suit brought by a trustee and stockholder of a corporation, against two of his co-trustees to compel the latter to convey to the corporation certain mining property. After the suit had been commenced, the corporation was, by order of the court, made a party defendant, and answered, admitting the allegations of the complaint and praying for the same relief as the plaintiff. There are no questions of law in the case, and a brief reference to the facts will be sufficient. In November, 1902, one Olston, who had an option from Young and Fischer for the purchase of the Sunset group of mines in the Blue River district, interested one T. S. Cogswell, a mining broker in Seattle, in the enterprise, and he in turn persuaded the plaintiff, Gillett, and the defendants, Dodge and Runyard, to visit the mines with a view to investing. After inspecting the property, Gillett, Dodge and Runyard agreed to take a three-fourths interest in the option, advancing \$1,500 to secure the same; the remaining one-fourth to belong to Olston and

Cogswell as a consideration for their services in promoting the enterprise. On December 16, 1902, the five persons above named organized the Sunset Gold Hill Mining Co., a corporation, under the laws of the State of Washington, with a capital stock of \$1,000,000, divided into 1,000,000 shares of the par value of \$1 each, for the purpose of handling and developing the property, under an agreement that the respective interests of the parties should be transferred to the corporation. and they should take stock in payment therefor. In pursuance of this arrangement, Gillett, Dodge and Runyard each subscribed for 250,000 shares, and Cogswell and Olston for 125,000 each, and these five persons were elected trustees. Each of the persons named thereupon conveyed to the corporation his interest in the contract or option for the purchase of the mining property, in consideration of which the corporation issued and delivered to him paid-up capital stock to the amount of his original subscription. They thereupon donated to the treasury of the corporation 200,000 shares of stock to be sold for the benefit of the company; the proceeds to be expended as directed by the trustees, or a majority of them, for any and all purposes, which they might deem necessary in conducting and carrying on the business. Two of the trustees went East for the purpose of selling treasury stock, but were unable to dispose of the same, and neither the corporation nor the promoters thereof provided money with which to take care of the option when it matured, and it expired by limitation on May 10, 1903. Thereafter, the defendant Dodge purchased the property on his own account and conveyed a one-half interest therein to his codefendant, Runyard.

The object of this suit is to have them decreed to hold the title so purchased in trust for the corporation. The complaint alleges, and the plaintiff insists, that the original contract or agreement between Cogswell and Olston, and Gillett, Dodge and Runyard was that the latter should purchase and pay for the mining property with their own funds, and then convey it to the corporation in payment of the capital stock subscribed for by them, and that the purchase made by Dodge after the expiration of the option was in fraud of his copromoters, and ought

to be declared to be for their benefit. These positions are controverted by the defendants, who claim that the understanding was that the payments due on the purchase price of the mines should be paid by the corporation from the proceeds of the sale of its treasury stock, and that as no money was received from that source, and none provided by the promoters, the option expired by limitation, and thereafter Dodge purchased the property on his own account with the knowledge and consent of all parties. The evidence on these questions is conflicting, but a careful examination of the record satisfies us that the trial court was right in finding in favor of the defendants. They are supported on the point that the purchase price of the mining property was to be paid by the corporation from the proceeds of the sale of the treasury stock by Mr. Douglas, the attorney under whose advice the corporation was formed, and who prepared the several papers necessary to carry out the plans of the incorporators, and who was familiar with all the transactions in reference to the matter, and also by letters written by the plaintiff and Olston.

Douglas testifies that, according to his understanding, Gillett, Dodge and Runyard were under no obligation to purchase the property with their own funds, but that the treasury stock of the corporation was to be sold to raise money with which to complete such purchase, and that the stock subscribed for by the respective parties was fully paid up by the transfer to the corporation of the subscriber's interest in the option. Olston wrote, under date of January 28, 1903, to Runyard: "As soon as any money appears in the treasury, better make a payment on the purchase price." On February 9th, he wrote: "If things are hanging fire back East, I wish you would advance the company ten or fifteen hundred with which to make a payment, as we must avoid the possibility of any complications." On March 26th he wrote Gillett: "I have felt that Cogswell and I have been more than fair in the Sunset deal and believing that you and Dodge have disposed of stock with which to pay for the mine as agreed upon by the directors, and one-fourth of which Mr. Cogswell and I contributed, I deem it but fair

and just that a part of the consideration be paid now to avoid any trouble and litigation." And, again, on the 29th: "Mr. Cogswell and I shall protect ourselves by having the consideration deposited in case of failure of the company to make payment on that day." On March 7th, the plaintiff wrote to Dodge, who was East for the purpose of selling stock: "Don't let any decent offer go by for a big block — anything above 20,000 dollars for the 150 or even 200 thousand shares, for we must get this property sure, as there are parties after it that are willing to pay five times as much as we do." And, again, on March 23d, he wrote to Dodge, advising him that he (Gillett) had "bought out" Runyard, and that "now it is you and me to carry the thing through, and I believe we can. I have a good help here on this end, but not near enough to carry it through, so push all you can and come on when you like, only raise all possible for we will need it or lose all. Take any reasonable offer for a big block of the stock. Don't hesitate to use your own judgment, only get it and I will stand by you." And, on the same day, he wired Dodge: "Go ahead, close quick, make more concessions if necessary."

These letters and telegrams were written and sent before there was any controversy between the parties, and quite clearly indicate that the understanding of Olston and Gillett was that the property should be paid for by the corporation from the proceeds of the stock to be sold by it. It is reasonably clear, therefore, that Dodge was under no obligation to take up the option with his own funds for the benefit of the corporation, and violated no duty to it in doing so. The purchase of the property by him, after the expiration of the option held by the corporation, was open and above board, and with the knowledge and consent of his associates. They were all, with perhaps the exception of Cogswell, at Eugene at the time, and were without funds and unable to raise money with which to pay their shares of the purchase price. They were informed by the owners of the property after the expiration of the option that it would be sold to the first party who desired to purchase it at the price demanded. Plaintiff had no money with which to make the purchase, and

said he was sorry to lose the property, but had nothing more to say, as the time had expired. Dodge's purchase was made openly, after consulting and advising with his attorney, and there is no disclosure by the record which will justify a court in decreeing that he should now convey it to the corporation which had lost its rights by not complying with the option.

Decree affirmed.

AFFIRMED.

Argued 19 March, decided 16 April, 1907.

COOPER v. STRAUBER.

80 Pac. 641.

MORTGAGES—ABSOLUTE DEED—EVIDENCE.

In a suit to have a deed declared a mortgage, and for permission to redeem, on the claim that plaintiff transferred his interest in the contract for the deed to defendant only to secure a loan, evidence examined, and held sufficient to sustain the finding, that the transfer was intended as an absolute sale of plaintiff's interest in the contract.

From Polk: WILLIAM GALLOWAY, Judge.

Suit by Alexander Cooper against Michael Strauber and wife to declare a deed in favor of defendants, a mortgage, and for permission to redeem. From a decree in favor of defendants, plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Frank Holmes*.

For respondent there was a brief and an oral argument by *Mr. Carey F. Martin*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a suit to declare a deed held by the defendant to certain real property to be a mortgage, and for permission to redeem. On September 30, 1902, the plaintiff contracted with Tilmon Ford for the purchase of the real property in controversy, for the sum of \$690. One hundred dollars of the purchase price was paid down, and the remainder was to be paid in installments on May 1st of each year. At the time of the contract the plaintiff and his son, William, were partners, and the first payment was made from the proceeds of logs cut and

sold by them. After the making of the contract the plaintiff and his son went into possession of the property and cut and sold from the land, logs, from the proceeds of which they made payment of \$200 on May 1, 1903. On February 6, 1904, the plaintiff assigned and transferred to the defendant, who is the father-in-law of William, all his interest in the Ford contract for \$160, and thereafter the latter made the deferred payments, and on March 25, 1905, received a deed from Ford. The son William died in August, 1904. The plaintiff alleges and testifies that the assignment and transfer of his interest in the Ford contract to the defendant was for the purpose of securing the payment of \$160 borrowed by him; while the defendant claims that the plaintiff and his son, being unable to agree, he (defendant) purchased the plaintiff's interest in the contract at the request of the son or of the son's wife.

The court below found in favor of the defendant, and in our opinion its finding is supported by the great weight of the testimony. The plaintiff's testimony stands practically alone and uncorroborated, while that of the defendant is supported by that of William's wife, Mr. Carey F. Martin and Mr. Ford. Mrs. Cooper says that the plaintiff and her husband did not get along harmoniously, in consequence of which it was agreed between them, in her presence, that if her husband could raise the money, the plaintiff would sell out to him for \$160, which was his share of the money paid on the contract, with interest. At her husband's request, she telephoned her father, the defendant, to ascertain whether he could furnish the money, and made an appointment with him to meet her husband and the plaintiff at Salem, to consummate the sale; that on the day appointed her husband and his father went to Salem for the purpose stated, and on their return told her that they had consummated the deal as agreed upon, and plaintiff said: "My father had everything in his hands now that he deeded it away to him"; that plaintiff remained on the place for a short time thereafter, and then went away and did not return for a month or such a matter; that after the death of her husband, in August, 1904, the

plaintiff took and removed from the place all the things belonging to or claimed by him.

The defendant testified that in response to a telephone message from his daughter, he came to Salem, on February 6, 1904, prepared to purchase the plaintiff's interest in the Ford contract; that after having the contract examined by an attorney, and ascertaining that it could be lawfully assigned, he made the purchase and paid the consideration; that the transaction was intended to be, and was, an absolute sale and transfer of all plaintiff's interest, and was not intended as a mortgage.

Mr. Martin says that on February 6, 1904, the defendant brought the Ford contract to him, to ascertain if it could be lawfully assigned without Mr. Ford's consent, and being advised that it could, he and plaintiff, and plaintiff's son, later came into the office and witness wrote out the assignment, and it was executed and acknowledged by the plaintiff; that before it was executed he inquired of the plaintiff if he understood the nature of the assignment, and plaintiff replied that he did; that it was stated at the time by some of the parties, witness does not remember who, that by the transfer plaintiff sold all his interest, and that thereafter Mr. Ford would have a new paymaster; that at witness' suggestion the parties went over to Ford's office and notified him that plaintiff had sold out to defendant, and that defendant would make the deferred payments on the contract.

Mr. Ford testified that some time after the death of William Cooper the plaintiff told him that he did not claim any interest in the land, but had a claim against the estate of his son, which he wished to collect; that while the contract with the witness for the purchase of the land was in plaintiff's name, his son, William, had a one-half interest therein, but that he, plaintiff, had sold out to his son, or his son's wife, for \$160, which was borrowed of the defendant.

This testimony shows quite clearly that the assignment and transfer from the plaintiff to the defendant was intended as a sale of all his interest in the Ford contract, and that he is mistaken in the contention now made.

AFFIRMED.

Argued 22 October, decided 17 December, 1907.

MARKS v. BLOOMER.

98 Pac. 140.

From Douglas: JAMES W. HAMILTON, Judge.

For appellant there was a brief and an oral argument by *Mr. Albert Abraham*.

For respondent there was a brief over the names of *Mr. William W. Cardwell* and *Mr. James O. Watson*, with an oral argument by *Mr. Cardwell*.

Opinion by MR. COMMISSIONER KING.

This is an action to recover a balance of \$781.83, with interest, alleged to be due plaintiff from defendant on a promissory note, and was argued and submitted at the same time as the case of *Sutherlin v. Bloomer*, 50 Or. 398 (93 Pac. 135), in which an opinion is filed at this time. With the exception of the third error assigned in that suit, the points presented and urged in this action are the same as in that proceeding.

In disposing of the question there argued as to the sufficiency of the answer to entitle defendant to a decree of dismissal, we necessarily determined all questions involved in this appeal adversely to defendant's contention.

Based on the authority of that case, we find there was no error in the proceedings of the court below, and its judgment must accordingly be affirmed.

AFFIRMED.

Argued 22 October, decided 17 December, 1907.

CHAN HI v. BLOOMER.

98 Pac. 141.

From Douglas: JAMES W. HAMILTON, Judge.

For appellant there was a brief and an oral argument by *Mr. Albert Abraham*.

For respondent there was a brief over the names of *Mr. William W. Cardwell* and *Mr. James O. Watson*, with an oral argument by *Mr. Cardwell*.

AFFIRMED.

Opinion by MR. COMMISSIONER KING.

This is an action at law by plaintiff for the recovery of a balance of \$1,350, alleged to be due him from defendant on a contract for labor. The bill of exceptions discloses the same questions to be involved here, as urged in *Sutherlin v. Bloomer* (decided on this date), 50 Or. 398 (93 Pac. 135), except as to the third error therein assigned.

That case having determined the points here involved adversely to defendant's contention, it follows that the judgment of the circuit court in this action must be affirmed.

AFFIRMED.

Argued 22 October, decided 17 December, 1907.

DOUGLAS COUNTY BANK v. BLOOMER.

93 Pac. 141.

From Douglas: JAMES W. HAMILTON, Judge.

For appellant there was a brief and an oral argument by *Mr. Albert Abraham*.

For respondent there was a brief over the names of *Mr. William W. Cardwell* and *Mr. James O. Watson*, with an oral argument by *Mr. Cardwell*.

AFFIRMED.

Opinion by MR. COMMISSIONER KING.

This is an action by the Douglas County Bank against defendant to recover \$300, with interest, alleged to be due plaintiff on a promissory note, in which the points involved are, in effect, the same as in *Sutherlin v. Bloomer* (decided on this date), 50 Or. 398 (93 Pac. 135), except as to the third error there urged.

The judgment of the trial court must accordingly be affirmed.

AFFIRMED.

Argued 18 July, decided 6 August, 1907.

WHITE v. WHITE.

91 Pac. 1184.

From Washington: THOMAS A. McBRIDE, Judge.

For appellant there was a brief and an oral argument by *Mr. H. K. Sargent*.

For respondent there was a brief and an oral argument by *Mr. Samuel B. Huston*.

PER CURIAM. This is a suit by the wife for a divorce on the ground of desertion. The answer denies the abandonment, and alleges that the defendant was obliged to leave his home by reason of the plaintiff's cruel and inhuman treatment, the facts of which are stated by way of cross-bill, and the prayer is that the suit be dismissed; that he may have the divorce and also be allotted an undivided one-third of her real property, a description of which is given. The allegations of new matter in the answer and cross-complaint were denied in the reply, on which issues the cause was tried and a decree rendered as prayed for in the complaint, from which the defendant appeals.

No good purpose can be promoted by setting out any part of the testimony, a perusal of which persuades us that no error was committed in granting the plaintiff the divorce, which decree is affirmed.

AFFIRMED.

Argued 7 August, decided 3 September, 1907.

LOGAN v. BENSON.

91 Pac. 581.

From Marion: WILLIAM GALLOWAY. Judge.

This is a suit to enjoin the defendant, as Secretary of State, from filing a referendum petition, seeking to invoke the referendum upon House Bill No. 241 (Laws 1907, p. 118), requiring transportation companies to grant free transportation to public officials.

For appellant there was a brief over the names of *Mr. Andrew M. Crawford*, Attorney General, *Mr. Lionel R. Webster* and *Mr. Seneca Smith*, with oral arguments by *Messrs. Crawford, Webster* and *Smith*.

For respondent there was a brief over the names of *Mr. Dan J. Malarkey* and *Mr. John F. Logan*, with oral arguments by *Mr. Malarkey* and *Mr. Logan*.

REVERSED.

MR. JUSTICE EAKIN delivered the opinion of the court.

This suit was argued and submitted with the case of *Stevens v. Benson*. 50 Or. 269 (91 Pac. 57), and involved the same question; and upon the authority of that case the decree of the lower court is reversed, and a decree will be entered here dissolving the injunction and dismissing the suit. REVERSED.

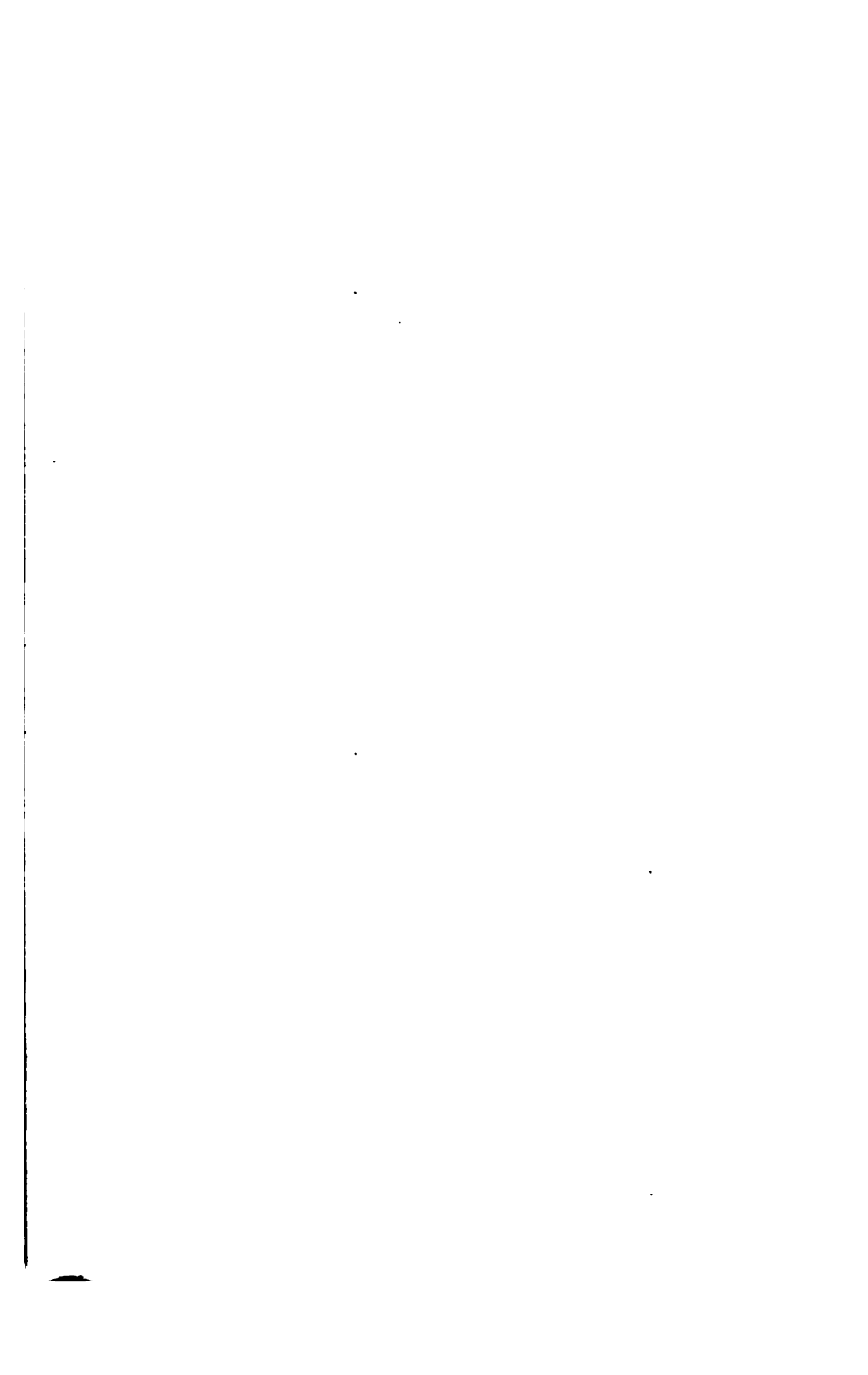


RULES OF SUPREME COURT

WITH ANNOTATIONS

BY

ROBERT G. MORROW



THE RULES*
OF THE
SUPREME COURT OF OREGON

EFFECTIVE OCTOBER 1, 1907.

TRANSCRIPTS.

CONTENTS.

RULE 1. Transcripts on appeal in civil cases shall consist of a copy or printed abstract, as in these rules provided, of so much of the record as may be necessary to intelligibly present the questions to be determined, together with a copy of the judgment or decree appealed from, the notice of appeal and proof of service thereof, and of the undertaking on appeal; and, in criminal cases, the indictment and demurrer, if any, the journal entries of the plea, trial, verdict and judgment, and any other order involving the merits and necessarily affecting the judgment; the bill of exceptions, if there be one, and the notice of appeal and certificate of probable cause, if any.† If the appeal is from a decree, the transcript shall be accompanied by the original testimony, depositions, and other papers containing the

***POWER TO PRESCRIBE RULES.**—The supreme court has both inherent and statutory power to prescribe reasonable rules for the conduct of its business (*Carney v. Barrett*, 4 Or. 171; *Coyote Gold Min. Co. v. Ruble*, 9 Or. 121), and such rules, while in force, must be applied to all cases that come within their provisions. No discretion can be exercised as to their application unless such discretion is authorized by the rules; thus, where the rules (6 Or. VII-XV) did not provide for extending the time within which to apply for a rehearing, a petition filed after the expiration of the time limited by the rule was disregarded: *Coyote Gold Min. Co. v. Ruble*, 9 Or. 121.

†**OMITTING UNNECESSARY MATTER.**—The transcript should not be encumbered with useless matters, such as the repetition of the title of the case, signatures of officers and attorneys, and filing marks: *Ferguson v. Byers*, 40 Or. 468, 476 (69 Pac. 32).

evidence heard or offered on the trial, certified to by the clerk of the court below**: B. & C. Comp. §§ 208, 209, 553, 1448, 1479.

FORM AND ARRANGEMENT.

RULE 2. Every transcript shall be on legal-cap size paper, and typewritten or printed on one side only, shall be chronologically arranged, and prefaced with an index* specifying the first page of each separate paper, order or proceeding, and in civil cases shall be made in substantially the following form:

TRANSCRIPT.

JOHN DOE, Appellant (or Respondent),

v.

RICHARD ROE, Respondent (or Appellant).

Appeal from the Circuit Court of _____ County; Hon. _____, Judge.

A B, Attorney for Appellant.

C D, Attorney for Respondent.

Be it remembered, that heretofore, on the ____ day of _____, 19—, a

COMPLAINT

was filed in the office of the clerk of the circuit court in and for the county of _____, in words and figures as follows: (Here insert complaint in full.)

And afterwards, on the ____ day of _____, 19—, there was filed in the office of said clerk a

SUMMONS,

in words and figures following, to-wit: (Here insert summons in full. All indorsements to be upon the face and not upon the back of the leaf.)

**CERTIFICATE TO EXHIBITS.—Where a suit is tried before a referee the exhibits must be identified and certified to by the trial judge; but if the suit is tried before the court with a stenographer, the exhibits must be identified by the clerk and the transcript of the notes certified to by the stenographer: *Sanborn v. Fitzpatrick*, 91 Pac. 540. (Case not yet finally decided.)

*The index is important and should be supplied or the appeal may be dismissed: *Standard Steam Laundry v. Dole*, 20 Utah, 469 (58 Pac. 1109).

Upon which (or attached to it) was a return as follows:
(Copy return in full.)

And afterwards, on the — day of —, 19—, there was filed in the office of said clerk a

DEMURRER (OR MOTION)

to said complaint, as follows: (Here copy demurrer or motion in full.)

And afterwards, on the — day of —, 19—, it being the — day of the — term of said court, the following

ORDER

overruling (or sustaining) said demurrer (or motion) was made: (Copy order in full. Proceed in same manner as to all motions or demurrers to the complaint.)

And afterwards, on the — day of —, 19—, there was filed in the office of said clerk an

ANSWER,

in words and figures, as follows: (Here insert answer in full. If a motion or demurrer to the answer was filed, note the fact in the manner indicated above in regard to a motion or demurrer to the complaint.)

And afterwards, on the — day of —, 19—, the plaintiff filed his

REPLY,

in words and figures, as follows: (Here set out reply in full. If motions or demurrers were filed to the reply, proceed as indicated above for complaint.)

And afterwards, on the — day of —, 19—; it being the — day of — term of said court, the cause came on for trial, when the following proceedings were had: (Here insert journal entry in full. If the cause was heard before a jury and the verdict was not returned until a subsequent day, proceed as follows:)

And afterwards, on the — day of —, 19—, it being the — day of said term, the jury returned the following

VERDICT.

(Here insert verdict in full.)

And afterwards, on the — day of —, 19—, it being the — day of said term, the following

JUDGMENT

was rendered: (Here insert copy of judgment entry.)

And afterwards, on the — day of —, 19—, the plaintiff (or defendant) filed his

BILL OF EXCEPTIONS.

in words and figures, as follows: (Here insert in full the bill of exceptions.)

And afterwards, on the — day of —, 19—, the plaintiff (or defendant) filed his

NOTICE AND UNDERTAKING ON APPEAL,

in words and figures as follows: (Here insert notice and undertaking on appeal in full.) Upon which was the following return or proof of service: (Copy return in full.) Then add the certificate of the clerk to the transcript as required by statute. Should the clerk doubt what the paper is, let him call it "Paper in words and figures following." When a paper is filed in term time, add the day of the term to the day of the month.*

CAPTION TO EACH PAPER.—In the transcript the title of the court and cause should be set out at the head of the first paper, and its omission thereafter is not a serious matter, though it is preferable to repeat the word "title" at the beginning of each subsequent paper: *State v. Hanlon*, 32 Or. 95 (48 Pac. 353).

UNNECESSARY MATTER.—The transcript should not be enlarged by the addition of immaterial matter, and upon objection being made the cost of preparing such matter will not be allowed: *Albert v. Salem*, 39 Or. 466, 481 (66 Pac. 233); *Ferguson v. Byers*, 40 Or. 468, 475 (69 Pac. 32).

*NOTE.—The foregoing form is intended only as a suggestion, and is to be varied according to the circumstances of each particular case. The actual facts of the case will dictate what is to be done; but in all cases, civil as well as criminal, the transcript is to be prepared substantially in conformity with the above form, giving the proper order and date of filing papers, and incorporating them at the proper date as to the proceedings of the court, omitting from the transcript all unnecessary papers, such as undertakings on appeal, cost bills when not involved therein, as well as papers and orders which have ceased to perform any office in the case, such as demurrers and original pleadings when superseded by amended ones or waived by pleading over, unless such original pleadings are necessary to a proper understanding of the questions to be presented on appeal. The title of the court and cause, unless otherwise directed, may be omitted from all papers except the first paper in the cause, but the word "title" shall be used, and the character of the paper, whether complaint, summons, answer, etc., shall be designated. The file marks and indorsements may also be omitted, unless otherwise directed.

NUMBERING PAGES—FEES.

RULE 3. Transcripts and testimony must be paged by numbering the leaves consecutively to the end on the bottom of the leaf near the left-hand corner, and the name of the paper or witness must be written thereon on the left-hand margin near the bottom. The testimony must be preceded by an index in which shall be noted the first page of the testimony of each witness. No transcript shall be filed by the clerk unless prepared in compliance with the foregoing rules, except by special order of the court or one of the justices thereof. No transcript or abstract in a civil case will be filed by the clerk until the appellant shall have paid to him the sum of \$15, or no brief or other paper will be filed for respondent until he shall have paid to the clerk the sum of \$10: B. & C. Comp. § 887.

ABSTRACTS.

PRINTING AND SERVING.

RULE 4. Within twenty days after the transcript is filed in a civil case, the appellant shall serve upon an attorney for each respondent a printed copy of so much of the record prepared, as hereinafter provided, as may be necessary to a full understanding of the questions presented for decision, and file with the clerk of this court proof of such service, together with sixteen copies of said abstract, and no case shall be docketed for hearing until this and other rules are complied with, except by order of the court. In case of cross-appeals, the party first giving notice of appeal shall, under this rule, be considered the appellant. In criminal cases a printed abstract may be served and filed, or not, as the appellant shall elect.

EFFECT OF NOT FILING ABSTRACT.—For non-compliance with this rule the judgment appealed from may be affirmed or dismissed: *Swanson v. Leavens*, 26 Or. 561 (40 Pac. 230); *Close v. Close*, 28 Or. 108 (42 Pac. 128). The fact that part of the record has been lost is no excuse for not printing and serving the abstract, where it does not appear that any effort has been made within a reasonable time to supply the deficiency: *Close v. Close*, 28 Or. 108 (42 Pac. 128).

EXCUSE FOR NOT FILING ABSTRACT.—Where more than one case is pending involving a given question it will usually be sufficient to print

the record in one case, and the others may be submitted by referring to that: *Garnsey v. County Court*, 33 Or. 201 (54 Pac. 539).

EXCUSING DELAY IN FILING ABSTRACT.—Where the rules were misunderstood by counsel, and no injury resulted therefrom a short delay was excused: *Nottingham v. McKendrick*, 38 Or. 495 (57 Pac. 195).

[See, also, annotations to Rules 6 and 14.]

ADDITIONAL ABSTRACTS.

RULE 5. If the respondent shall deem the appellant's abstract imperfect or unfair, he may, within ten days after receiving a copy thereof, deliver to the appellant's counsel one, and to the clerk of this court, with proof of service upon appellant, sixteen printed copies of such further or additional abstract as he shall deem necessary to a full understanding of the questions involved in the appeal.

WAIVER OF OBJECTIONS TO ABSTRACT.—After respondent has filed an additional abstract, he will not be heard to object that appellant's abstract was incomplete: *Whipple v. Southern Pac. Co.* 34 Or. at p. 372 (55 Pac. at p. 975).

BRIEFS.

PRINTING AND SERVING.

RULE 6. Within twenty days after the service of the abstract as required by Rule 4, and within the same period after the transcript is filed in criminal cases, if no abstract is served, where the appeal presents only questions of law upon the rulings of the court below, the appellant shall serve upon the attorney for each of the respondents one copy of his brief, and deliver to the clerk of this court, with proof of service upon respondent, sixteen copies thereof, and within twenty days thereafter the respondent shall serve upon the attorney for the appellant one copy and deliver to the clerk sixteen copies of his brief, with like proof of service, and the appellant shall have ten days thereafter in which to serve upon respondent one copy and deliver to the clerk sixteen copies of a reply brief with proof of service, if he so desires. But where the appeal is from a decree and to be tried anew upon the transcript and evidence accompanying it, the plaintiff shall open and close, and as to printed briefs shall observe the rules requiring the service and filing of such brief

by appellant. A failure by appellant to comply with this rule within the time required, or such modification thereof as may be made, shall be deemed and considered as cause for affirmance or dismissal of the appeal, and a failure by the respondent as a waiver of the right to be heard.

EXCUSING DEFAULT IN FILING BRIEFS.—On a proper showing, a default in filing briefs may be excused, as where the printer was not as prompt as he had promised to be (*Neppach v. Jones*, 28 Or. 286: 39 Pac. 999); or, the same questions were in another case in which the abstract and briefs had already been filed (*Garnsey v. County Court*, 33 Or. 201: 54 Pac. 539); or, sickness of counsel (*Wagner v. City of Portland*, 40 Or. 389, 392: 60 Pac. 985); or that the delay was due to excusable neglect: *Wood v. Fisk*, 45 Or. 276, 281 (77 Pac. 128).

Unless reasonable excuse is presented, however, a default by appellant in filing briefs will cause the appeal to be dismissed: *Blank v. Walker*, 33 Or. 372 (53 Pac. 1133); *Reynolds v. Jackson County*, 33 Or. 422 (53 Pac. 1072); *State v. Rowe*, 36 Or. 79 (60 Pac. 203); *State v. Horn*, 39 Or. 152 (65 Pac. 1066); *Carter v. Wakeman*, 47 Or. 212 (82 Pac. 858).

[See, also, Rules 4 and 14.]

TYPOGRAPHY OF ABSTRACTS AND BRIEFS.

RULE 7. All abstracts and briefs shall be printed upon unruled white paper, either from eleven-point (small pica) or twelve-point (pica) type, leaded with two-point or three-point leads. The size of the page must be six and one-quarter by nine and one-half inches, and the printed page shall be twenty-two by thirty-nine ems, pica, exclusive of folio at head of the page; the outer, top and bottom blank margins of each page to be one and one-half inches wide. The cover, or if no cover is used, the first page, shall set forth the title of the case, designating the appellant and respondent, the term of this court to which the appeal is brought, the court from which the appeal is taken, the name of the judge who presided, and of counsel for the respective parties, and the party in whose behalf the same is filed, whether appellant or respondent.

CONTENTS OF BRIEFS.

RULE 8. The printed brief shall state the several propositions of law claimed to be involved in the case, and the authorities relied upon for the support of the same separately from the argument. The points and authorities must be first dis-

tinctly stated and the argument set forth supplementary thereto. When an authority cited is an adjudicated case, the names of the parties, the volume in which reported, and the particular page or pages containing the matter to which counsel desires to call the attention of the court must be set out. When the reference is to a text-book the number or date of the edition must be stated, with the number of the volume and page. In equity cases the brief shall also contain such portions of the evidence as may be deemed material, giving the name of the witness, and may be in either narrative form or by question and answer.

FORM OF BRIEF.—A brief containing only a statement of the errors claimed, followed by a list of citations, with no orderly application of them to the errors assigned, will not be considered: *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65 (60 Pac. 594). A brief discussing simply abstract propositions of law, without applying them to some action of the trial court, is not entitled to consideration: *Board of Com'rs v. Moon*, 8 Okl. 205 (57 Pac. 161).

SIGNATURE TO BRIEFS.—Briefs signed by persons not licensed in the state will be stricken from the files: *Ellis v. Bingham County* (Idaho). 60 Pac. 80. A brief filed by an attorney who has since been disbarred will not be considered: *Engesser v. Northern Pac. R. Co.* 18 Mont. 31 (44 Pac. 279); *Stebbins v. Morris*, 18 Mont. 32 (44 Pac. 280).

CONTENTS OF ABSTRACTS.

RULE 9. The printed abstract of the record must be accompanied by a complete index* of its contents, and shall be made substantially in the following form:

IN THE SUPREME COURT OF THE STATE OF OREGON.

——— Term, 19——.

JOHN DOE, Appellant (or Respondent),

v.

RICHARD ROE, Respondent (or Appellant.)

APPELLANT'S ABSTRACT OF RECORD.

Appeal from the judgment of the Circuit Court for ——— County; Hon. ———, Judge.

A B, Attorney for Appellant.

C D, Attorney for Respondent.

***NECESSITY FOR INDEX.**—A good index greatly facilitates the labor of the court, and it may be insisted upon: *Standard Steam Laundry v. Doie*, 20 Utah, 469 (58 Pac. 1109).

On the — day of —, 19—, the plaintiff filed in the Circuit Court for — County a

COMPLAINT,

stating his cause of action (or suit) as follows: (Set out all of the complaint necessary to an understanding of the questions to be presented to this court, and no more. In setting out exhibits, omit all merely formal irrelevant parts; as, for example, if the exhibit be a deed or mortgage, and no question is raised as to the acknowledgment, omit the acknowledgment. When the defendant has appeared it is useless to encumber the abstract with the summons, or the return of the officer. Append to the abstract of each paper a reference to the page of the transcript on which it will be found.)

On the — day of —, 19—, the defendant filed a

DEMURRER

to the said complaint, setting up the following grounds: (State only the grounds of demurrer, omitting the formal parts. If the pleading was a motion, and the ruling thereon is one of the questions to be considered, set it out in the same way, and continue.)

And on the — day of —, 19—, the same was submitted, and the court made the following ruling thereon: (Here set out the ruling. In every instance let the abstract be made in the chronological order of the events in the case—let each ruling appear in the proper connection. If the defendant pleaded over, and thereby waived his right to appeal from the ruling, no mention of it should be made in the abstract; and if no question is to be raised on the appeal growing out of the rulings of the court upon motions or demurrers, no mention should be made of them in the abstract, but it should continue.)

And on the — day of —, 19—, the defendant filed his

ANSWER

as follows: (Here set out so much of the answer as may be necessary to explain the questions raised on the appeal, and no more, omitting all formal parts. If motions or demurrers were

interposed to this pleading, proceed as directed with reference to the complaint. Frame the record so that it will properly present all questions to be reviewed and raised before issue was joined, and none other. When the abstract shows issue joined, proceed.)

On the — day of —, 19—, said cause was tried by a jury (or the court, as the case may be) and on the trial the following proceedings were had: (Set out so much of the bill of exceptions, or the substance thereof, as is necessary to show the ruling of the court to which exceptions were taken during the progress of the trial and which will be urged as error on the appeal, and no more.)

After the evidence and the arguments of counsel were concluded, the plaintiff (or defendant, as the case may be) asked the court to give the following

INSTRUCTIONS

to the jury: (Set out the instructions referred to and continue;) each of which the court refused; to which said several rulings the plaintiff (or defendant) excepted at the time, and thereupon the court gave the following instructions to the jury: (Set out the instructions.)

To the giving of those numbered (give number), and to the giving of each thereof, the plaintiff (or defendant) at the time excepted.

VERDICT.

On the — day of —, 19—, the jury returned into court with the following verdict: (Set out the verdict, if necessary to a perfect understanding of the questions presented; if not, state the party in whose favor rendered.)

And on the — day of —, 19—, the following

JUDGMENT (OR DECREE)

was entered: (Set out the judgment or decree appealed from, or so much thereof as may be necessary.)

ASSIGNMENTS OF ERROR.

And the appellant herein says there is manifest error on the face of the record in this: (Here assign and set out briefly and concisely the errors relied upon for a reversal or modification of the order, judgment, or decree appealed from.)*

CONSIDERATION OF ASSIGNMENTS OF ERROR.

RULE 10. On the hearing in this court, no questions will be examined or considered, except those going to the jurisdiction of the court, or when the pleading does not state facts sufficient to constitute a cause of action or defense, or those arising upon the assignments of error, as contained in the printed abstract.

ASSIGNING ERRORS IN ABSTRACT.—An assignment of error not going to the jurisdiction of the court or the sufficiency of a pleading must be set out in the printed abstract to receive consideration: *Re Assignment of Bank of Oregon*, 32 Or. 84 (51 Pac. 81).

WAIVING OBJECTION OF LACK OF INDEX.—The objection that the abstract is not indexed should be promptly made; it is too late after respondent's brief has been filed: *Whipple v. Southern Pac. Co.* 34 Or. 370 (55 Pac. 975).

AMENDING ABSTRACT BY ADDING INDEX.—Where the omission of the index was accidental and a satisfactory explanation is made, the abstract may be amended accordingly: *Kieffer v. Victor Land Co.* 90 Pac. 582 (not yet finally decided).

CONTENTS OF ABSTRACT.—It is not necessary to include all the pleadings in the abstract, but only such parts of the transcript should be printed as are necessary to enable the court to understand the questions to be discussed: *Cox v. Alexander*, 30 Or. 438, 443 (46 Pac. 794, 795). The abstract should be limited to the matter indicated by the rule, and the practice of printing unnecessary matter is disapproved: *Young v. State*, 36 Or. 417, 426 (60 Pac. 711); *Hammer v. Downing*, 39 Or. 504, 530 (67 Pac. 30); *Ferguson v. Byers*, 40 Or. 468, 475 (69 Pac. 32).

The appellant need provide only a record that fairly presents the questions involved in his appeal, and if other matter is desired by respondent, he should present it by additional abstract: *Backhaus v. Buells*, 43 Or. 558, 560-563 (72 Pac. 976).

SUPPLYING OMISSIONS FROM ABSTRACT.—Where appellant has unintentionally failed to include the assignments of error in the abstract, and respondent has not been materially affected thereby, the omission may be

*NOTE.—This outline is presented for the purpose of indicating the character of the abstract contemplated by the rule, which, like all the rules, is to be substantially complied with. Of course, no form can be laid down applicable to all cases. The rule to be observed in abstracting the case is, preserve everything material to the question to be decided, and omit everything else.

excused, and the abstract amended accordingly: *Fleischner v. Bank of McMinville*, 36 Or. 553, 555 (54 Pac. 884); *Skinner's Will*, 40 Or. 571, 575 (52 Pac. 523); *Kieffer v. Victor Land Co.* 90 Pac. 582 (not yet finally decided).

WAIVING OBJECTION OF INSUFFICIENCY OF ABSTRACT.—The filing of an additional abstract by respondent is a waiver of the objection that the appellant's abstract is incomplete: *Whipple v. Southern Pac. Co.* 34 Or. at p. 372 (55 Pac. at p. 975).

HOW TO GET PERMISSION TO AMEND ABSTRACT.—Where parties desire to amend their abstracts, they should apply to the court for permission to do so by a formal written motion, supported by affidavits: *Fleischner v. Bank of McMinville*, 36 Or. 553, 555 (54 Pac. 884).

EXTENDING TIME TO FILE ABSTRACT.—In case an extension of time has already been granted, or if the time applied for be unusual, the adverse party must be notified before additional time will be granted; but if the application is to extend the period given by the rules, or if a short extension be requested to an additional time already granted, no notice need be given: *Wachsmuth v. Routledge*, 36 Or. 307, 309 (51 Pac. 443).

NECESSITY FOR ASSIGNMENTS OF ERROR.—Where the appeal is taken from a decree entered on the pleadings, formal assignments of error are not imperatively necessary, though it is better practice to have them (*Nepach v. Jones*, 28 Or. 286; 39 Pac. 999); nor will the appeal be dismissed for lack of assignments of error where it sufficiently appears that the error complained of is the entering of a certain order which is fully set out with sufficient of the record to make it intelligible (*Medynski v. Theiss*, 36 Or. 397; 59 Pac. 871); and where the assignments were inadvertently omitted, they may be filed as a supplemental abstract, where respondent has not been affected by the omission: *Fleischner v. Bank of McMinville*, 36 Or. 553 (54 Pac. 884); *Skinner's Will*, 40 Or. 571, 575 (62 Pac. 523); *Kieffer v. Victor Land Co.* 90 Pac. 582 (not yet finally decided).

NEED OF SPECIFICATIONS OF ERROR.—A specification of the errors relied upon is an indispensable prerequisite to the consideration of cases, and where the errors claimed are not specified, the judgment will be affirmed: *Harrington v. Smith*, 25 Mont. 111 (63 Pac. 1036); *Hickey v. Kaufman*, 34 Mont. 106 (85 Pac. 870).

WAIVING AND MODIFYING RULES.

RULE 11. When for any reason a strict compliance with the rules relating to the preparation and service of abstracts or briefs becomes impossible or inconvenient, and a waiver or modification thereof, or an extension or shortening of time is desired in any case, the party desiring such waiver or modification or change of time, may at any time before he is in default apply to any justice of this court in vacation, or to the court in term time, for an order directing the same. The application shall be made in writing, and shall set out the particular facts relied

upon by the applicant, and shall be certified to by counsel as being true and made in good faith. The order, if made by the court, shall be entered in the journal, and if by one of the justices, filed with the clerk. In no case will these rules, or any of them, be waived, suspended or modified upon agreement of counsel only.

MODIFICATION OF RULES.—These rules will sometimes be modified in the interest of justice, even after default: *Neppach v. Jones*, 28 Or. 286 (39 Pac. 999); *Garnsey v. County Court*, 33 Or. 201 (54 Pac. 539); *Nottingham v. McKendrick*, 38 Or. 495 (57 Pac. 195).

DISPOSAL OF ABSTRACTS AND BRIEFS.

RULE 12. The clerk shall make the following distribution of the printed abstracts and briefs received under the foregoing rules: Two copies to each justice of the court and to the reporter, one copy to the State Library, and one to be filed in his office.

ABSTRACT AS TRANSCRIPT.

RULE 13. The printed abstract provided for by these rules shall be deemed and considered an abstract within the meaning of Section 553 of the Code, B. & C. Comp.

EFFECT OF VIOLATING RULES.

RULE 14. In case the appellant shall, without reasonable excuse, fail or neglect to serve and file abstracts or briefs as required by the rules of this court, the respondent may have the judgment or decree affirmed on motion and notice; and in case of an abandoned appeal, the opposite party may, by presenting a copy of the judgment or decree, undertaking, notice of appeal, and proof of service thereof, have the judgment or decree likewise affirmed on motion; and if in either case it appear to the satisfaction of the court that the appeal was taken for delay only, may recover such damages as the court shall order.

ABANDONED APPEAL.—This rule is the outcome of the practice first sanctioned in 2 Or. 117, but the filing of part of the record as here provided for does not give the supreme court jurisdiction to do anything except enter an order of affirmance: *Heurichsen v. Smith*, 29 Or. 475 (42 Pac. 486).

AFFIRMANCE FOR ABANDONMENT.—Where the surety on the undertaking for appeal refuses to justify within the required time, and no transcript has been filed in the supreme court, the order appealed from may be affirmed on compliance with the second clause of this rule: *United States Trust Co. v. Marquam*, 41 Or. 371, 372 (64 Pac. 643).

It is doubtful if an appeal can be dismissed for non-compliance with the rules: *Steiger v. Fronhofer*, 43 Or. 178, 182 (72 Pac. 693).

DOCKETING CAUSES.

RULE 15. After the rules in regard to serving and filing abstracts and briefs have been complied with, the cause shall be put upon the trial docket in its proper order.

SETTING CASES FOR ARGUMENT.

RULE 16. Civil causes on the trial docket will be set down for argument as near as convenient in the order of their entry, due notice of which will be given to the attorneys of the respective parties by the clerk; but the court may, whenever in its judgment a cause is of sufficient public importance, on the application of either party, direct it to be set down for argument out of its order; *provided*, parties in either civil or criminal cases may upon stipulation submit the same on briefs at any time.

INSTANCES OF SUBMISSIONS WITHOUT ARGUMENT: 40 Or. 154; 43 Or. 288; 44 Or. 45, 514; 45 Or. 198, 225, 277, 292, 624; 49 Or. 313.

SETTING TIME FOR HEARING.

RULE 17. In criminal cases the clerk shall, when the briefs are filed, or the time elapsed (unless application for further time to file the same shall have been granted) under these rules for filing the same, set the case down for hearing, unless otherwise ordered by the court. And a copy of all briefs in criminal cases, whether filed by the defendant or the district attorney, must be served on the attorney-general, as well as the adverse party, and must have proof of such service indorsed before filing.

WITHDRAWING PAPERS.

RULE 18. No paper on file with the clerk shall be taken from the court room or office of the clerk, except by order of the

court or one of the justices; *provided*, either party may withdraw the transcript of the record and testimony for the purpose of making abstracts or briefs upon giving a receipt therefor to the clerk, and upon such withdrawal may retain the same for ten days.

MOTIONS.

MOTION DAY.

RULE 19. The second Tuesday of the term, and each Tuesday thereafter, shall be motion day, at which time all motions, proper notice of which has been given, shall be heard.

SERVING AND FILING MOTIONS.

RULE 20. All motions, and the affidavits or documents in support thereof, must be filed with the clerk, and, except as otherwise provided, served by copy upon the opposite party or counsel ten days before the date specified in the notice for the hearing. The opposite party shall then have five days to file and serve papers on the other party or his counsel in resistance to the same, and no paper shall be regarded which does not appear to have been so served. The court may, on application, by order, shorten the time for service.

SERVICE OF MOTION TO SUPPLY MISSING RECORD.—An application for leave to supply a defect in the transcript is not a paper in resistance of a motion to affirm because none of the alleged errors appear in the record owing to the absence of the bill of exceptions: *Garbade v. Larch Mountain Invest. Co.* 36 Or. 368 (59 Pac. 711).

TIME FOR SERVING AFFIDAVITS.—Affidavits or counter affidavits served after the time limited by this rule will not be considered, though as an excuse for not filing them sooner it was shown that counsel was engaged in trying a case: *Osborn v. Newberg Orchard Assoc.* 36 Or. 444 (59 Pac. 711).

ENLARGING TIME TO FILE TRANSCRIPT.

RULE 21. An application to this court or a justice thereof for an order enlarging the time in which to file a transcript shall be accompanied by a stipulation of the respondent consenting thereto or by proof of notice to respondent of such application at least five days before the same is made; *provided, however*, that when the time in which to file the transcript will

expire by limitation before such notice can be given, the court or a justice thereof may enlarge the same sufficiently to enable the required notice to be given.

REHEARING.

FORM AND CONTENTS OF PETITION.

RULE 22. All applications for rehearing shall be by petition in writing or printing, signed by counsel, setting forth wherein it is claimed the court has erred, and shall be filed within twenty days next after the filing of the opinion. Counsel may accompany the petition with a brief of the authorities upon which they rely in support thereof, but no oral argument will be heard thereon. Counsel shall serve a copy of such petition on the adverse party and furnish the clerk with five copies thereof, but it will not be necessary for the adverse party to answer such petition unless requested to do so by the court.

RIGHT TO PETITION FOR REHEARING.—After the original argument, the decree appealed from was affirmed. On rehearing the court reconsidered and reversed the decree. *Held*, that appellant was entitled to file a petition for rehearing, as it had not before exercised that right: *Brauer v. City of Portland*, 35 Or. 471 (59 Pac. 117).

EFFECT OF FILING PETITION.

RULE 23. The filing of a petition for a rehearing shall suspend further proceedings under the decision until the petition is disposed of, unless the court in term time, or the justices in vacation, shall otherwise order: 39 Or. 525.

PROCEEDINGS AFTER JUDGMENT AND BEFORE PETITION FOR REHEARING IS FILED.—Under this rule steps to secure the fruit of a judgment of the supreme court may be taken at once upon the announcement of the conclusion of the court, and are not stopped until the petition for rehearing is filed; thus, a judgment entered in the journal before a rehearing was asked is not prematurely entered: *Hammer v. Downing*, 39 Or. 504, 523 (65 Pac. 990).

MANDATE.

RULE 24. Upon the disposition of a petition for rehearing or if within twenty days after final judgment or decree no petition shall have been filed, the clerk shall, as a matter of

course, unless he is directed by the court otherwise, issue and forward a mandate to the clerk below.

FILLING IN BLANKS IN JUDGMENT ORDER.—When the mandate has been asked for, if within sixty days after the final disposition of the case, the clerk may fill in blanks left in the final order when entered, as, for instance, the amount of the costs: *Richardson v. Orth*, 40 Or. 252, 269 (69 Pac. 455).

COSTS.

ALLOWANCE FOR PRINTING.

RULE 25. It shall be the duty of the clerk in taxing costs to allow the prevailing party the actual cost of printing his abstract or brief (for not exceeding 40 copies). But he shall not allow exceeding \$1 a page, including cover, when printed in twelve-point type, and \$1.15 a page when printed in eleven-point type, unless for special reasons apparent in the record it shall be otherwise ordered.

LIMIT OF ALLOWANCE.—Parties will be allowed only the sums actually paid out for printing: *Hammer v. Downing*, 39 Or. 504, 529 (67 Pac. 30); *Portland Iron Works v. Willett*, 49 Or. 245, 258 (90 Pac. 1000).

Where an item is objected to as unreasonable or excessive, the claimant must affirmatively show the propriety of the charge or the objection will be sustained: *Young v. Hughes*, 39 Or. 586, 596 (66 Pac. 272).

COST OF UNNECESSARY MATTER.—Matter not required under a fair interpretation of the rules should not be printed, and the cost of such printing is not a proper disbursement: *Young v. State*, 36 Or. 417, 426 (60 Pac. 711); as, printing both an original and an amended pleading (*Hammer v. Downing*, 39 Or. 504, 530: 67 Pac. 30); or long indorsements and file marks: *Ferguson v. Byers*, 40 Or. 468, 475 (69 Pac. 32).

ABSTRACT MATTER IN BRIEFS.—Matter properly belonging in the abstract should not be reprinted in the brief, and the expense of so doing will not be allowed: *Ferguson v. Byers*, 40 Or. 468, 477 (69 Pac. 32).

COSTS RESULTING FROM DELAY.—Where a respondent can present a motion to dismiss an appeal he should do so promptly, and if he delays, successfully urging it at a later date, he will not be allowed costs or disbursements incurred after the motion might have been made: *Oregon Elec. Ry. Co. v. Terwilliger Land Co.* 93 Pac. 930.

SERVICE OF COST BILLS.

RULE 26. All cost bills shall be served upon the adverse party, and proof of service endorsed thereon before filing. (As amended August 11, 1908, took effect October 1st.)

TAXATION.

RULE 27. Costs and disbursements in this court will be taxed by the clerk, and his decision upon all matters of taxation of costs, and upon objections thereto, shall stand as the taxation by the court, unless the party affected by such taxation shall within ten days after such taxation or decision move to retax the same: 39 Or. 594; 43 Or. 487; 44 Or. 529; 45 Or. 139; 87 Pac. Rep. 530.

NEED OF VERIFYING OBJECTION.—Where it is practically conceded that a party claiming an item of costs is entitled to it, but the objection made goes to the reasonableness of the amount asked (it not being fixed by statute), the objection ought to be verified; but where the objection goes to the item itself as not properly claimed, the objection is in the nature of a demurrer, and need not be verified: *Oregon Elec. Ry. Co. v. Terwilliger Land Co.* 93 Pac. 930.

RULE 28. The clerk shall not tax costs for any matter included in the transcript contrary to these rules, unless specially directed by the court; nor shall any costs be taxed unless the cost bill therefor shall be filed before the mandate is issued.

EXTENT OF ALLOWANCE.—Only the amount actually paid for the transcript will be allowed as a disbursement: *Hammer v. Downing*, 39 Or. 504, 529 (67 Pac. 30).

COST OF UNNECESSARY PAPERS.—The expense of copying unnecessary papers into the transcript will not be allowed: *Albert v. Salem*, 39 Or. 466, 480 (66 Pac. 233); *Ferguson v. Byers*, 40 Or. 468 (69 Pac. 32).

ITEMS NOT CHARGEABLE.—The costs in the trial court cannot be collected in the supreme court by a successful party who had no opportunity to file a cost bill before appeal (*Albert v. Salem*, 39 Or. 466, 480; 66 Pac. 233); nor is the clerical expense of preparing a motion for a new trial (*Young v. Hughes*, 39 Or. 586, 597; 66 Pac. 272); or other papers: *Ferguson v. Byers*, 40 Or. 468, 477 (69 Pac. 32).

ITEMS CHARGEABLE.—A reasonable charge for extending stenographic notes of the trial to be used in preparing and presenting the case on appeal is an allowable disbursement: *Young v. Hughes*, 39 Or. 586, 597 (66 Pac. 272).

PRACTICE.

RULE 29. The mode of review of final decisions of the circuit court, when the course of proceeding is not specifically pointed out by statute, shall be by appeal as in actions at law, but questions of fact shall not be considered upon such appeal, unless made a part of the record by a bill of exceptions.

ADMISSION TO THE BAR.

DAYS FOR EXAMINATION.

RULE 30. The second day of the October term, and such other time at any term as may be ordered, on the written application of five or more persons desiring admission, shall be set apart as the time when persons desiring admission to practice as attorneys in the courts of this state may appear and present their applications, who, having been examined in open court touching their qualifications for admission and found duly qualified, may be admitted to practice as attorneys and counselors at law in the several courts of this state. Applications for admission can only be made to this court.*

*The history of admission of attorneys to the bar, and the question of the power of the legislature to regulate admissions to the bar, is exhaustively reviewed in the cases of *Re Day*, 181 Ill. 73 (50 L. R. A. 519: 54 N. E. 646); and *In re Applicants for License*, 143 N. C. 1 (55 S. E. 635). The prevailing and dissenting opinions in these cases present fully both views as to the inherent powers of courts of justice to regulate the admission of attorneys to practice, showing the whole course of the authorities and rules in both England and America.

SUBJECTS FOR EXAMINATION.

RULE 31. Applicants for admission as attorneys shall be examined by the justices of the supreme court, or under their direction, and only such shall be admitted as shall be properly learned in the common law, the law merchant, the principles of equity jurisprudence, the history and constitutional law of England prior to the Declaration of Independence, the history and constitutional law of the United States, the statute and constitutional law of this state, and the practical administration of the law. Such examination shall be conducted in writing, or partly in writing and partly orally, as the court may direct.

CERTIFICATES OF STUDY AND CHARACTER.

RULE 32. Each applicant for admission must produce the certificate of some attorney in good standing in this court that such applicant, if a graduate of some college or other literary

institution authorized to confer degrees, has read law two years, or if not a graduate, at least three years; and that such applicant has the requisite learning and ability. There shall also be presented the certificate of two attorneys of like standing to the effect that such applicant is a man of good moral character. In case, however, the applicant produces a diploma from any regular law school or shows that he is a graduate thereof, then the certificate of his having read the time above indicated shall be dispensed with. The applicant shall also file his own affidavit that he is a citizen of the United States and of this state, or has complied with the statutory requirements in that connection, is over the age of twenty-one years, and has read the books a list of which is included in his affidavit.

ATTORNEYS FROM OTHER JURISDICTIONS.

RULE 33. Attorneys and counselors at law and solicitors in chancery who have been admitted to practice in the highest courts of any other state, territory or district, or of England, her colonies or dependencies where the common law prevails, and who are otherwise qualified, may be admitted to the bar of this state without examination upon presenting their certificate of admission to such courts, accompanied by a petition in writing, verified by the oath of the petitioner, showing (1) where he was first admitted to practice, all places and the periods of time during which he has practiced as an attorney or counselor at law, and especially the place, the period of time and the court before whom he last practiced; and (2) whether or not any proceedings for his disbarment or suspension have been instituted or prosecuted at any time or place. Such petition must also be accompanied by the certificate of the presiding judge of the highest court in which he last practiced, or was admitted to practice, to the effect that the petitioner was in good standing and trustworthy in his profession in such jurisdiction, and also the certificate of two attorneys of this court to the effect that they believe him to be a reputable attorney and a person of good moral character. Such applicant may, if deemed qualified by the court, be licensed to practice law for a period of nine

months from and after the date of such license, and the clerk shall immediately notify the secretary of the State Bar Association of such order; *provided, however*, that if such license would expire during any vacation of this court, then, and in that event, it shall continue in force until the third Monday of the succeeding term of this court to be held at Salem. In the event that any objection is made to the final admission of any person so licensed to practice law in this state, such objection shall be made in writing, setting forth the grounds thereof, and shall be filed with the clerk, and may, at the discretion of the court, be referred to three attorneys appointed by the court for investigation and report, under such conditions as may be set forth in the order of reference; *provided, however*, that the court may, in its discretion, either continue or revoke the temporary license pending such investigation and report. In case no objection is so made and filed within six months after the making and entry of the order granting the temporary license to practice, then such applicant at any time after the expiration of said six months may, on written motion of an attorney of this court, be permanently admitted to practice law in the courts of this state; *provided, further*, that a resident and citizen and attorney of the highest court of record in a sister state, under the laws of which an attorney who is a citizen of this state may be admitted to the bar thereof, may, upon furnishing the proof above required as to his good moral character, be admitted generally as an attorney in all respects as if he were a citizen of this state.

FEES FOR ADMISSION.

RULE 34. Applicants for admission upon examination shall pay to the clerk \$10 and upon certificate \$20: Laws 1907, p. 426.

DIMINUTION OF RECORD.

RULE 35. For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same, in writing, to this court, and, upon good cause shown, obtain an order that the proper clerk certify up the whole or part of the record, as may be required; or the same may be cor-

rected by stipulation of counsel, in writing, filed with the clerk before argument. If the attorney of the adverse party be absent, or if the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged.

FILING OMITTED OR AMENDED RECORD.—An incorrect bill of exceptions may be subsequently corrected *nunc pro tunc* by the trial court, and the amended record filed in the supreme court (*State ex rel. v. Estes*, 33 Or. 197: 52 Pac. 571); and, where the bill of exceptions was submitted to the trial judge within the time allowed for so doing, but was not settled and signed until after the transcript on appeal had been filed, a motion for leave to file the bill should be allowed: *Washburn v. Interstate Invest. Co.* 26 Or. 436 (36 Pac. 533); *Garbade v. Larch Mountain Invest Co.* 36 Or. 368: 59 Pac. 711; *Bloch v. Sammons*, 37 Or. 600 (55 Pac. 438).

The practice under this rule has been liberal in the interest of aggrieved parties where the defect in the transcript can be cured, therefore a motion to require a missing paper to be certified up will be entertained, though not made until after a motion to dismiss had been filed: *Ferrari v. Beaver Hill Coal Co.* 94 Pac. 181 (case not yet finally decided).

BRINGING UP ORIGINAL PAPERS.

RULE 36. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any district, that original papers or exhibits of any kind should be inspected in this court, such judge may make such order for the safe keeping, transporting and return of such papers or exhibits as to him may seem proper, and this court will receive and consider such papers or exhibits in connection with the transcript of the proceedings.

PENDLETON TERM.

RULE 37. The foregoing rules governing the service of abstracts and briefs shall not apply to cases for hearing at Pendleton, except that the abstract provided for in these rules shall be deemed an abstract within the purview of Section 553, B. & C. Comp.; and, when accompanied by a copy of the judgment or decree appealed from, the notice of appeal and proof of service thereof and the undertaking on appeal may be filed in lieu of a transcript.

(a) No civil case will be heard at Pendleton unless the appeal has been perfected at least fifteen days before the first day of the term.

(b) In cases for hearing at Pendleton, the appellant, except in equity cases to be tried anew, must serve a brief containing a concise statement of the errors relied upon, within thirty days after the appeal is perfected, and file the same in the appellate court at least ten days before the first day of the term. The respondent shall serve his brief within twenty days after the service of the appellant's brief upon him, and file the same within five days before the first day of the term; *provided*, that in all cases for hearing at Pendleton, the first brief shall be served and filed at least five days before the first day of the term, and the answering brief by the first day. When the appeal is from a decree in equity and is to be tried anew upon the transcript and evidence accompanying it, the plaintiff shall open and close, and as to printed briefs shall observe the rule requiring the service and filing of such brief by appellant.

EFFECT OF NOT FILING BRIEF.—In cases heard at Pendleton the brief must be filed as here provided or the judgment may be affirmed (*State v. Horn*, 39 Or., 152; 65 Pac. 1066); though a short delay may be excused where the appeal is evidently prosecuted in good faith: *Wood v. Fisk*, 45 Or. 276, 281 (77 Pac. 128).

SPECIFYING ERRORS.—A reasonable compliance with the rules is all that is required, and in this case the errors were specified with sufficient certainty: *First Nat. Bank v. Miller*, 48 Or. 587, 589 (87 Pac. 892).

I hereby certify that the foregoing is a true copy of the Rules of the Supreme Court of the State of Oregon, as adopted by order of court duly entered on the 25th day of July, 1907, to be in force from and after October 1st, 1907.

Dated at Salem, Oregon, July 25, 1907.

J. C. MORELAND,
Clerk.



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TO
RULES OF SUPREME COURT
BY
ROBERT G. MORROW



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ABATEMENT AND REVIVAL.

ABATEMENT AND REVIVAL.

1. A suit to restrain a probate judge and a creditor of an estate that was in his court from removing the administratrix is not abated by the expiration of the judge's term of office, for it continues as to the creditor, and an injunction against him will be effective to stop vexatious proceedings.—*Alderman v. Tillamook County*, 48.

ABATEMENT—OTHER SUIT PENDING.

2. That plaintiff commenced an action at law against defendant for a violation of a contract giving defendant the right to cut and remove certain timber, and also brought a suit in equity to reform one of the contracts, and that such litigation is pending and undetermined, does not prevent an action to restrain the further cutting of timber in violation of the contract.—*Roots v. Boring Junction Lum. Co.* 298.

CONTRACT—ACTION FOR BREACH—ISSUE—ABATEMENT.

3. Where, in an action for breach of a contract whereby plaintiff agreed to increase its capital stock and defendant agreed to buy a part thereof, the complaint alleges the issuance of the increased stock and the tender of a certificate of a part thereof to defendant, and the answer denies the allegations, the question of the validity of the increase of the stock is one of the very things in dispute and not a matter to be pleaded in abatement.—*Pacific Mill Co. v. Inman*, 22.

PLEA IN ABATEMENT—CONSTRUCTION.

4. Since pleas in abatement do not question the merits, but merely tend to delay the remedy, they are not favored, and much strictness is applied to them, and they will not be aided in construction by any intendments. With them correctness of form is a matter of substance, and any defect of form is fatal.—*Sutherland v. Bloomer*, 398.

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1. Any action, suit, or proceeding may be settled by accord and satisfaction thereof by a separate agreement, if made for a valuable consideration.—*Sutherland v. Bloomer*, 398.

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2. Whether an agreement for the settlement of a suit or the performance thereof shall constitute a satisfaction, depends upon the intention of the parties thereto; the rule applying to oral contracts, if executed, as well as written ones.—*Sutherland v. Bloomer*, 398.

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Plaintiff and defendant, W., who was a member of a firm of real estate brokers having an option to purchase a tract of land for \$5,000, contracted to buy the land on a basis of \$7,000, under an agreement providing that if plaintiff and defendant W., within 60 days after the payment of the earnest money, paid the balance of \$6,850, the owner's agent agreed to convey the land, etc. *Held*, that such agreement bound W. and plaintiff to pay the owner \$7,000 for the land, and hence the fact that W. thereafter avoided fulfilling his part of the obligation by exercising an option held by his firm, did not create a liability on W.'s part to account to plaintiff for the amount saved.—*Scott v. White*, 111.

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ACTION—JOINDER—CAUSES ARISING UNDER CONTRACT.

2. Under the express provisions of Section 94, B. & O. Comp., more than one cause of action arising out of contract may be united in the same complaint, but must be separately stated.—*Bade v. Hibberd*, 501.

BILLS AND NOTES—ACTION BY HOLDER.

3. Under Section 4453, B. & O. Comp., authorizing the holder of a negotiable instrument to sue thereon in his own name, where a note belonging to defendant was attached and sold under execution, the purchaser might sue thereon in his own name, irrespective of whether the indorsement by the sheriff to him was regular or irregular.—*Flahburn v. Londershausen*, 563.

ADMINISTRATION

Of Estates of Deceased Persons. See EXECUTORS AND ADMINISTRATORS.

ADVERSE POSSESSION.

ELEMENTS.

1. Occupancy of land necessary to constitute title by adverse possession, must be so open and exclusive as to leave no inquiry as to occupant's intention, so notorious that the owner may be presumed to have knowledge that the occupancy is adverse, and so continuous as to have furnished a cause of action every day during the required period. Acts less continuous and of brief duration, do not constitute such occupancy as would ripen into a title by adverse possession.—*McNear v. Gulstin*, 377.

SUFFICIENCY OF EVIDENCE.

2. Evidence in a suit to determine an adverse claim to real estate, to the effect that defendant had visited the land forty or fifty times in ten years, occasionally pruning a few fruit trees and planting one or two sacks of potatoes, held, not to show occupancy by defendant sufficient to acquire title by adverse possession.—*McNear v. Gulstin*, 377.

ACQUISITION OF RIGHTS BY PRESCRIPTION.

3. Purchasers of a farm, under whom plaintiff and defendant respectively claimed, mutually agreed that one should take that part lying west of a certain road and south of another road, and the other purchaser the remainder. Before the deeds were made a survey was had. After the survey deeds were made to the purchasers, intending to use the description furnished by the surveyor, and the purchasers immediately entered into possession, and they and their successors in interest occupied the same without question for at least sixteen years, when it was discovered that, as defendant asserted, about twenty-three acres south of the road, and which had been in possession of plaintiff and his predecessors in interest, were included in the description of land conveyed to defendant's grantor, and she thereupon set up title to the same. Held, that the occupancy of plaintiff and his predecessors in interest gave him title by adverse possession, regardless of the descriptions in the deeds, and notwithstanding that because of error in the descriptions or in the calculation of the area, one of the purchasers paid for more land than she acquired and the other for less.—*Cooper v. Blair*, 564.

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APPEAL AND ERROR.

PRESUMPTION OF VERITY OF RECORD.

1. While the records of a court may be amended, if necessary, to make them conform to the truth, it must be presumed that the record as presented by the transcript correctly shows what and all that occurred in the matter under consideration.—*State v. Walton*, 142.

REVIEW.

2. The determination of the court that a confession of accused was obtained without the influence of hope or fear will not be disturbed on review, unless there is clear and manifest error.—*State v. Blodgett*, 523.

MATTERS NOT OF RECORD—BILL OF EXCEPTIONS.

3. Where the bill of exceptions on an appeal from a conviction for violation of the local option law referred to a writing in the following terms: "Defendants offered in evidence articles of incorporation of the Corvallis Social & Athletic Club (marked 'Defendants' Exhibit D'), as follows: (Clerk print)"—and that was the only reference to the document, and the direction to print was not obeyed, though the articles of incorporation may have been included in a package of papers certified to by the clerk, it was not a part of the bill of exceptions, and when not identified by the trial judge, it cannot be considered on appeal.—*State v. Kline*, 426.

APPEAL RECORD—BILL OF EXCEPTIONS—MATTERS NOT INCLUDED.

4. Documentary evidence which is not made a part of the bill of exceptions cannot be considered on appeal.—*State v. Kline*, 426.

REVIEW—NECESSITY FOR PRESENTATION OF QUESTION IN TRIAL COURT.

5. The only question brought up for review on appeal in a law action are such as have been properly submitted to and considered by the trial court.—*State v. Kline*, 426.

QUESTIONS TO BE CONSIDERED—MATTERS NOT RAISED IN LOWER COURT.

6. Where a bank sues on notes indorsed to its cashier in his own name only, and the question of the bank's right to maintain the action is not raised at the trial, it cannot be considered on appeal.—*First Nat. Bank v. McCullough*, 508.

REVIEW—CROSS-EXAMINATION—BILL OF EXCEPTIONS.

7. An assignment of error as to permitting cross-examination of a witness regarding matters not testified to on direct examination, cannot be considered, when the bill of exceptions does not purport to contain all his testimony on direct examination.—*First Nat. Bank v. McCullough*, 508.

FINAL ORDERS—DENIAL OF NEW TRIAL.

8. The denial of a motion for a new trial is not a final order from which an appeal will lie.—*First Nat. Bank v. McCullough*, 508.

RESERVATION OF GROUNDS OF REVIEW.

9. A decision of a trial court is not reviewable on appeal, unless the question was distinctly presented to the trial court for its action. Hence, where the trial court was not requested to give any instruction involving a consideration of all the testimony, the evidence will not be examined on appeal to determine whether, on the whole evidence, the judgment was right.—*First Nat. Bank v. McCullough*, 508.

WHAT DECREE IS ENFORCEABLE AFTER APPEAL AND AFFIRMANCE—JURISDICTION TO MODIFY AFTER MANDATE.

10. After an equity case has been tried on appeal and the mandate of the supreme court with the appropriate decree entered in the trial court, the original decree ceases to have any force, the decree ordered by the appellate court takes its place, and the latter is not subject to any change or modification by the circuit court.—*Krause v. Oregon Steel Co.*, 88.

RIGHT OF SUPREME COURT TO MODIFY DECREE AFTER CLOSE OF TERM.

11. The rule that by the lapse of the term a court loses jurisdiction of a cause in which a final order has been entered, applies to the supreme court as well as to the circuit courts, and after the term the only power remaining in the supreme court is to recall the mandate for the purpose of correcting an error of the court, to settle the cost bill, or to determine some matter relating to the enforcement of the decree; there is no power to modify the decree or judgment in its essential features.—*Krause v. Oregon Steel Co.*, 88.

TRANSCRIPT—TIME FOR FILING.

12. Under Section 549, B. & C. Comp., an appellant is required to file a transcript within thirty days after the perfection of the appeal. *Held*, that where, on notice of appeal, the trial judge entered in the bench docket a memorandum that appellant was given sixty days to file a bill of exceptions, the memorandum did not amount to an order enlarging the time to file a transcript.—*Robinson v. Robinson Cheese Co.*, 468.

REVIEW—RETURN—CONCLUSIVENESS—JURY LIST.

13. The return on a writ of review to review judicial proceedings is conclusive as to the facts. The return on a writ of review to review proceedings of the recorder's court of a city on a trial for the violation of a municipal ordinance, showed that accused demanded a jury, and that, the court having no list of jurors in accordance with Section 2251 *et seq.*, B. & C. Comp., ordered an officer to select jurors, and that accused objected to that manner of selecting a jury, and filed a motion that a jury be selected from the jury list. *Held* to show

that accused, at the time of his demand for a jury, had the right, as expressly authorized by Section 2257, B. & O. Comp., to demand a jury from the jury list, and the court could not direct an officer to select a jury.—*Cusiter v. City of Silverton*, 419.

NEW TRIAL—EXCEEDING JURISDICTION—MISTRIAL.

14. Where the error of the court on a prosecution for the violation of a municipal ordinance resulted from exceeding its jurisdiction in directing an officer to summon a jury, notwithstanding the demand of accused for a jury from the jury list, the error amounted to a mistrial only, and the cause, after conviction, must be remanded for new trial.—*Cusiter v. City of Silverton*, 419.

PARTIES ENTITLED—ACCEPTANCE OF BENEFITS.

15. Where defendant, in a suit to enjoin the cutting of timber on certain land, claims under a contract with plaintiff alleged to give the right to cut all the timber on such land, and the decree enjoins the cutting of timber under 12 inches in diameter, and defendant in the suit appeals, he will not be deemed to have accepted the benefits of the decree so as to preclude an appeal by cutting timber over 12 inches in diameter.—*Roots v. Boring Junction Lum. Co.* 298.

PROCEEDINGS FOR APPEAL—NOTICE—UNDERTAKING—FILING.

16. While it may be unnecessary for plaintiff who takes a cross-appeal to file a separate transcript, yet, where he does not file in the appellate court either his notice or his undertaking within the time for filing the transcript, the court acquires no jurisdiction of the appeal and need not notice a motion to dismiss it.—*Roots v. Boring Junction Lum. Co.* 298.

REVIEW—DISCRETION OF COURT—PLEADING.

17. The discretion of the court in permitting the filing of an amended reply, after portions of the original reply had been stricken out on motion, will not be disturbed on appeal in the absence of an abuse of discretion, and the failure to file an affidavit showing why such amended reply should be filed is not evidence of an abuse of discretion.—*Roots v. Boring Junction Lum. Co.* 298.

PRESUMPTION OF VERITY OF RECORD.

18. The record on appeal must be regarded as giving a true statement of the occurrences in the case, and *ex parte* certificates or affidavits cannot be considered against the transcript.—*Ollschlager's Estate*, 55.

RECORD—QUESTIONS PRESENTED—ARGUMENT OF COUNSEL.

19. Where an objection to an argument was overruled, on the ground that it was fairly an answer to the contention of the defendant's, the argument of defendant's counsel not being in the record, such ruling cannot be reviewed.—*Trickey v. Clark*, 516.

DISPOSITION OF CAUSE—PROCEEDINGS IN TRIAL COURT.

20. Where on appeal it was found that the trial court acted properly in sustaining a demurrer to the complaint, the cause would be remanded for further proceedings, within the discretion of the trial court.—*Flaburn v. Londershausen*, 368.

DIMISSING BECAUSE OF DEFECTIVE RECORD.

21. A suit will not be dismissed because the testimony and exhibits, or either of them, have not been transmitted to the supreme court with the rest of the record, as required by Section 553, B. & O. Comp., Subd. 1 and Rule 1 of the court, since there may be questions in the case not arising on the testimony.—*Leavenood v. McGee*, 285.

EFFECT OF MOTION TO DISMISS—COMPLETING RECORD.

22. A motion to dismiss an appeal for want of specified parts of the record may be treated as a suggestion of diminution, and the court may in its discretion allow the record to be completed rather than dismiss the appeal.—*Leavenood v. McGee*, 285.

REVIEW—PRESUMPTION—PLEADINGS.

23. Where a complaint is indefinite as to the character of a contract sued on, but contains averments which seem to imply that it was an express contract, and no objection is made to the complaint until the trial, on appeal the action will be construed as on an express contract.—*Bade v. Hibberd*, 501.

HARMLESS ERROR—ADMISSION OF EVIDENCE.

24. In replevin against a sheriff to recover property claimed under an execution sale on a judgment against a certain company, which property was held by defendant under a writ issued in a case by K. against the company, admission of evidence that K. had indemnified defendant against any loss by reason of the action, and that defendant was acting as sheriff when he took the property and held it as such, and that plaintiff's attorney in the first action was his agent in the purchase and possession of the property, was not reversible error where the verdict included no damages.—*Brown v. Lewis*, 384.

HARMLESS ERROR.

25. Error in an action for trespass to land, in allowing a witness to give his opinion as to the amount of damages resulting from the trespass, was harmless, it appearing that the incompetent testimony did not influence the verdict.—*Montgomery v. Somers*, 259.

PRESENTATION OF QUESTION BELOW—EXCEPTIONS—FAILURE TO MAKE FINDINGS.

26. Section 172, B. & C. Comp., provides that no exception need be taken or allowed to any decision on a matter of law when the same is entered in the Journal, or made wholly on matters in writing or on file in the court. *Held*, that under the statute, and as findings in law actions are entered in the Journal, the failure of the trial court to find on a counterclaim may be reviewed on appeal, though no exception was taken to such failure to find.—*Chung v. Stephenson*, 214.

FILING NOTICE AND PROOF OF SERVICE—TRANSCRIPT—IMPEACHING RECORD.

27. Section 549, B. & C. Comp., provides that, when an appeal is not taken at the time the decision is rendered, it may be taken at any time within six months thereafter by serving a notice on the adverse party or his attorney, and filing the original with proof of service indorsed thereon with the clerk. *Held*, that where the notice of appeal as it appeared in the transcript showed that it was filed August 26th, while the endorsement of proof of service was dated September 26th, appellants could not contradict the transcript by extraneous evidence showing that the service was in fact admitted August 26th, and the notice with the endorsement of such admission thereon was afterwards filed with the clerk, the remedy being by application to the court below to correct the record.—*Rodman v. Manning*, 506.

JURISDICTION CANNOT BE WAIVED BY PARTIES.

28. Serving and filing of notice of appeal are essential to give the Supreme Court jurisdiction, and cannot be waived by the parties.—*Rodman v. Manning*, 506.

RIGHT TO APPEAL.

29. The right to appeal a case is one conferred by statute, and is limited to cases falling within the terms of the act.—*Sears v. Dunbar*, 36.

MOTION TO DISMISS APPEAL—CONSIDERING MERITS.

30. In passing on a motion to dismiss an appeal the court ought not to consider the merits of the case.—*Sears v. Dunbar*, 36.

ILLUSTRATION OF ORDER NOT FINAL.

31. Under Section 547, B. & C. Comp., as amended by Laws, 1907, p. 313, c. 162, limiting appeals to orders affecting substantial rights and in effect determining suits, etc., an order, in a suit by a taxpayer against a former public officer to require him to account for moneys received in his official capacity during his term of office, denying defendant's motion to dismiss after a demurrer had been sustained to the complaint for plaintiff's incapacity to sue, and granting substitution of the State as plaintiff, is not appealable; the sustaining of the demurrer and the substitution not being final as to the suit.—*Sears v. Dunbar*, 36.

EXCEPTIONS—TRIAL DE NOVO.

32. Under the express terms of Sections 406 and 555, B. & C. Comp., on appeal, suits in equity are triable *de novo* on the transcript and evidence accompanying the appeal. Hence in equity appeals a bill of exceptions is unnecessary, and one cannot be considered, and, when accompanying the transcript, must be treated as surplusage, except in so far as the testimony there certified may be applied in determining the issues involved.—*Sutherland v. Bloomer*, 398.

EVIDENCE—OBJECTIONS TO TESTIMONY IN EQUITY SUITS.

33. In equity suits, in order that objections to admission of testimony may be of any avail on appeal, they must be taken and noted in the trial court.—*Sutherland v. Bloomer*, 398.

TAKING TESTIMONY OVER OBJECTION.

34. Where, at the trial, testimony is tendered, but objections thereto are sustained, the party offering the testimony may have it taken and recorded over the court's rulings, by offering to pay the additional expense incurred thereby in the event the proffered testimony shall finally be held inadmissible.—*Sutherland v. Bloomer*, 398.

COURT NOT PERMITTING TESTIMONY TO BE TAKEN.

35. Where testimony is proffered, objections thereto sustained, and notwithstanding a request that it be taken and recorded, as provided in Section 406, B. & C. Comp., the court refuses to permit the testimony to be taken, and it shall on appeal appear that the rejected testimony is essential to a proper determination of the issues, the case may be remanded with directions to admit the desired testimony.—*Sutherland v. Bloomer*, 398.

WHEN REMANDED FOR FURTHER PROCEEDINGS.

36. When objections are sustained to testimony offered, but recorded regardless of such ruling, and relying upon the correctness of the ruling of the court, no proof is offered in response to such testimony, and on appeal it shall be determined that the court erred in sustaining the objections thereto, the cause may be remanded for further proceedings, if deemed essential to a proper determination of the rights of the parties.—*Sutherland v. Bloomer*, 398.

REVIEW—QUESTIONS PRESENTED.

37. Where defendant in an equity suit manifested no desire to have testimony reported over the trial court's rulings, as might have been done under the express terms of Section 406, B. & O. Comp., questions as to the admissibility of the excluded testimony are not presented on appeal, except in so far as necessary to a review of other errors assigned.—*Sutherland v. Bloomer*, 398.

REVIEW—HARMLESS ERROR—FINDINGS.

38. Under section 406, B. & O. Comp., requiring findings on all material issues in equity cases, and providing that on appeal the cause shall be tried anew without reference to such findings, failure to make findings is not reversible error, where the transcript discloses all the proceedings had and evidence taken below, and especially where the complaining party does not appear to have been prejudiced.—*Sutherland v. Bloomer*, 398.

TIME FOR FILING TRANSCRIPT—POWER OF COURT.

39. Section 558, B. & O. Comp., providing for appeals to the supreme court, and authorizing the court, upon the appeal being perfected, to extend the time for filing the transcript, does not require that the undertaking on appeal must be filed before an order can be taken enlarging the time to file the transcript, but only that such order must be taken before the expiration of time already allowed for that purpose.—*Wolf v. City Ry. Co.* 61.

REVIEWING REFUSAL TO REDUCE VERDICT.

40. The action of a trial court in reference to a motion to set aside a verdict as excessive is not subject to review on appeal.—*Wolf v. City Ry. Co.* 61.

REVIEW OF INTERMEDIATE ORDER—HARMLESS ERROR.

41. On appeal complaint cannot be made of an order modifying a temporary injunction without the notice expressly required by statute, unless it shall appear that the injunction should have been permanently ordered.—*Wolfer v. Hurst*, 218.

INSOLVENCY—BOND ON APPEAL.

42. The insolvency of a defendant in a forcible entry and detainer action is immaterial in a suit to enjoin him from removing chattels from the premises in question pending the determination of such action, where the defendant appealed from the judgment and gave a bond for double the rental value and for restitution.—*Wolfer v. Hurst*, 218.

FORCIBLE ENTRY AND DETAINER—SUFFICIENCY OF UNDERTAKING.

43. Where on judgment for plaintiff in a forcible entry and detainer action defendants gave a bond under the express terms of Section 5754, B. & O. Comp., guaranteeing payment of twice the rental value of the land should judgment be affirmed, the undertaking must be presumed sufficient for the objects given, and is effectual for all purposes until the final determination of the cause, in the absence of objections or exceptions thereto.—*Wolfer v. Hurst*, 218.

HARMLESS ERROR—EVIDENCE SUBSEQUENTLY RECEIVED.

44. Error, if any, in rejecting evidence is rendered harmless and unavailable on appeal by subsequently receiving such evidence and submitting it to the jury.—*Hildebrand v. United Artisans*, 159.

BONDS—LIABILITY.

45. Under Sections 550, 551, B. & O. Comp., providing that an undertaking on appeal shall be to pay all damages and costs awarded on the appeal, but that in various cases the undertaking shall not stay proceedings, unless it further provides for payment of the judgment as affirmed. In a creditors' suit to uncover property that had been placed beyond the reach of an execution based on a judgment which plaintiff had recovered against defendants, defendants appealed from a decree against them, and, though the decree was not within section 550, the appeal bond was conditioned that the obligors would abide by the decision of the Supreme Court, and satisfy the judgment and decree so far as affirmed. *Held*, that the surety on the bond on affirmation of the decree was only liable for costs in both courts in the creditors' suit.—*Strubling v. Wilson*, 282.

NOTICE—SUFFICIENCY—JUDGMENT—SURPLUSAGE.

46. A reference in a notice of appeal from a judgment to the entry of the judgment in the "Judgment docket," while Section 196, B. & O. Comp., requires

the recording of judgments in the journal, which is, by section 583, a book in which the clerk must enter the proceedings of the court in term time, is a misdescription of the record intended, and may be disregarded as surplusage in determining the sufficiency of the notice.—*Summers v. Geer*, 249.

DESCRIPTION OF PARTY—SUFFICIENCY.

47. A defect in a notice of appeal, arising from the failure to state that the person named in the notice as appealing is the defeated party in the action, is not fatal, identity of the person being established under Section 738, subd. 25, B. & O. Comp., from the identity of name.—*Summers v. Geer*, 249.

REQUISITES OF NOTICE.

48. A notice of appeal from a judgment containing the name of the court and the parties, and reciting that the defeated party appeals from a judgment rendered and "entered of record in the above-entitled court," wherein and whereby it was ordered and adjudged substantially as follows," followed by the judgment appealed from, is sufficient under Section 549, B. & O. Comp.—*Summers v. Geer*, 249.

DISPOSITION OF CAUSE—REMANDING.

49. On appeal, in a foreclosure case, where it appeared from the record that defendant had a prior mortgage, but plaintiff, admitting the mortgage, claims it has been paid, but there is no proof of payment, and the trial court held a foreclosure by defendant valid, which on appeal is declared void, there is an issue undisposed of, and, where defendant's answer is in such a condition that the Supreme Court cannot give him the relief to which he is entitled, a final decree will not be rendered, but the case will be remanded with leave to defendant to amend his answer.—*Knapp v. Wallace*, 348.

APPEAL FROM ORDER GRANTING CONTINUANCE.

50. Rulings on applications for continuances do not involve the merits, or necessarily affect the judgment, within Section 557, B. & O. Comp., providing that on an appeal the court will review only such interlocutory orders as involve the merits or necessarily affect the judgment.—*Pacific Mill Co. v. Inman*, 22.

LAW OF THE CASE.

51. Where, on the second trial of a case, the issues have been changed, and much evidence admitted on the former trial has been excluded on the second, the decision of the supreme court on appeal from the judgment on the former trial is not the law of the case on a second appeal: *Stager v. Troy Laundry Co.* 41 Or. 141, distinguished.—*Pacific Mill Co. v. Inman*, 22.

QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.

52. Where, in an action for breach of contract, the court has properly granted a motion for judgment of nonsuit, questions as to the admissibility of evidence touching claims for damages are immaterial.—*Pacific Mill Co. v. Inman*, 22.

REVIEW OF EVIDENCE—BILL OF EXCEPTIONS.

53. Where the evidence is not in the bill of exceptions, and a transcript of what appears to be evidence is in the record, but the same is not identified by the court, or certified to be any or all of the testimony in the case, the court on appeal will not consider it.—*Jackson v. Sumpter Valley Ry. Co.* 455.

ASSAULT AND BATTERY.

ASSAULT WITH COWHIDE—SELF-DEFENSE.

1. The offense under Section 1766, B. & O. Comp., declaring a punishment for one who assaults another with a cowhide, having at the time in his possession a gun or other deadly weapon, with intent to intimidate and prevent the other from resisting, cannot involve the element of self-defense in favor of the assailant.—*State v. Taylor*, 449.

UNNECESSARY FORCE IN REMOVING TRESPASSER.

2. The gist of the offense under Section 1766, B. & O. Comp., being to beat another with a cowhide, or like thing, while being armed with a deadly weapon, with intent to intimidate and to prevent the other from resisting, the statute does not apply to an altercation or ordinary assault and battery, though the assailant is armed with a gun; so that, where the element of removal of a trespasser by defendant is involved, the use of more force than necessary for such purposes would constitute an assault, but would not be evidence of a violation of such statute.—*State v. Taylor*, 449.

ASSAULT WITH A LEATHER STRAP.

3. Under Section 1766, B. & O. Comp., an information held not to charge the crime of "assault, being armed with a cowhide," it charging the assault with a leather strap, without describing it.—*State v. Taylor*, 449.

ASSESSMENT.

For Expenses of Public Improvement.

See HIGHWAYS, 1.

See MUNICIPAL CORPORATION, 1, 3, 6.

ATTACHMENT.**ATTACHING CREDITOR—BONA FIDE PURCHASER.**

1. Section 802, B. & O. Comp., provides that from the date of an attachment until it is discharged, or the writ is executed, plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration, provided the sheriff's certificate required by section 801 is filed as required by section 808. *Held*, that an attaching creditor, in order to obtain the rights of a *bona fide* purchaser, is bound to prove that he in fact acquired his lien in good faith and without notice of outstanding equities.—*Jennings v. Lentz*, 488.

ATTACHING CREDITORS—NOTICE—RECORDS.

2. Sections 800-808, 6859, B. & O. Comp., provide that nonexempt real estate shall be liable to attachment by the sheriff making a certificate and filing the same with the clerk of the county in which the property is situated, and that from the date thereof the plaintiff, as against third persons, shall be a purchaser in good faith, and that every conveyance of real property within the State which shall not be recorded within five days after its execution shall be void as against a subsequent *bona fide* purchaser whose conveyance shall be first recorded. *L.* having sold certain land to *D.* for a consideration, half of which was secured by a mortgage thereon, *D.* within an hour conveyed the property to *G.*, who conveyed it to complainants' grantors. The mortgage to *L.* was recorded, but the deed to *D.* was not, and defendant, relying on a statement by *L.* that he had conveyed the land to *D.*, attached it for *D.*'s debt, after which the deeds to *D.* and complainants were recorded. *Held*, that *L.*'s statement that he had conveyed the land to *D.* was rebutted by the record which showed that the title still remained in *L.*, which record only gave notice of the facts therein stated and warned defendant to make further inquiries as to *D.*'s title to the premises, so that he was not a *bona fide* purchaser under his attachment, entitled to priority against complainants.—*Jennings v. Lentz*, 488.

PROPERTY SUBJECT—BILLS AND NOTES.

3. Sections 299-302, B. & O. Comp., provide in effect that all property not exempt from execution shall be subject to attachment, and that personal property capable of manual delivery, and not in possession of a third person, shall be attached by the sheriff taking it into his possession, and garnishment proceedings are provided to reach personal property not capable of manual delivery and in possession of a third person. Section 4598 defines a negotiable promissory note as an unconditional promise in writing engaging to pay on demand, or at a fixed or determinable time, a certain sum in money. *Held*, that a negotiable promissory note belonging to defendant, in his possession, and bearing no indorsements, was subject to attachment and sale under execution.—*Fishburn v. Londershausen*, 368.

BANKRUPTCY.

When Trustee May Maintain a Creditor's Suit. See CREDITOR'S SUIT, 2.

BENEFICIAL SOCIETIES. See INSURANCE.**BILL OF EXCEPTIONS.****AMENDMENT—NUNC PRO TUNC ORDER.**

1. Where an original bill of exceptions as filed, purported to contain the matters which were inadvertently omitted, the appellant, after argument of the appeal, and after notice given in the Supreme Court, was entitled to a *nunc pro tunc* order of the trial court amending the bill by inserting the omitted matter.—*McGregor v. Oregon R. & N. Co.* 537.

RECORD OF TRIAL—PRESUMPTIONS.

2. Under Sections 160-172, B. & O. Comp., relating to the record of the trial and preparation of a bill of exceptions, it is presumed that the record was kept by the court, and that the court prepared the bill of exceptions, so that an oversight in omitting matter intended to be included in the bill, is in law the error of the court, though it is the practice for the counsel to prepare and submit the bill of exceptions to the court for its approval.—*McGregor v. Oregon R. & N. Co.* 537.

In Equity Suits Cannot be Considered. See APPEAL AND ERROR, 82.

Affidavits for Change of Venue Must Appear In. See VENUE, 2.

Error on Cross-Examination of Witness Must Contain All His Testimony on Direct. See APPEAL AND ERROR, 7.

BILLS AND NOTES.

PROPERTY SUBJECT TO ATTACHMENT—BILLS AND NOTES.

1. Under Sections 299-302 and 4536, B. & O. Comp., a negotiable promissory note belonging to defendant, in his possession, and bearing no indorsements, is subject to attachment and sale under execution.—*Fishburn v. Londershausen*, 363.

ACTION BY HOLDER.

2. Under Section 4453, B. & O. Comp., authorizing the holder of a negotiable instrument to sue thereon in his own name, where a note belonging to defendant was attached and sold under execution, the purchaser might sue thereon in his own name, irrespective of whether the indorsement by the sheriff to him was regular or irregular.—*Fishburn v. Londershausen*, 363.

PAROL EVIDENCE AS TO INDORSEE OF NOTE—STATUTORY PROVISIONS.

3. The provision of the negotiable instrument law (Section 4441, B. & O. Comp.) that, when an instrument is drawn or indorsed to a person as "cashier" of a bank, it is deemed *prima facie* to be payable to the bank of which he is such officer, and may be negotiated by the indorsement of either the bank or the officer, was based on the theory that the qualifying word creates an ambiguity as to the real party intended, to explain which parol evidence is admissible; but, where a note is indorsed to N. without any qualifying word, even if N. is in fact the cashier of a bank, parol evidence is not admissible to show that the bank was the party intended as the indorsee.—*First Nat. Bank v. McCullough*, 508.

EFFECT OF TRANSFER WITHOUT INDORSEMENT—DEFENSES.

4. Under the law merchant, which has become a part of the common law, a transfer of a promissory note, payable to order, to bar equities, must be by indorsement to one who has no notice of the equities, and for a valuable consideration before maturity. Hence, where a note is indorsed to the cashier of a bank, who delivers it to the bank without indorsement, in a suit thereon by the bank the note is subject to all equities existing in favor of the makers.—*First Nat. Bank v. McCullough*, 508.

RIGHT OF ACTION—STATUTORY PROVISIONS.

5. A transfer without indorsement of a promissory note, payable to order, assigns under the law merchant only an equitable right, which could be enforced by suit in the name of the payee only; but under Section 27, B. & O. Comp., providing that every action, with certain exceptions, shall be prosecuted in the name of the real party in interest, a bank may maintain an action in its own name on a note transferred to it without indorsement.—*First Nat. Bank v. McCullough*, 508.

BONA FIDE PURCHASERS

As Attaching Creditors. See ATTACHMENTS, 1, 2.

Of Lands. See VENDOR AND PURCHASER, 1, 2.

BRIDGES.

AUTHORITY TO CONSTRUCT AND REPAIR.

1. In an action for personal injuries sustained because of a defective bridge, testimony to show that the road and bridge had been kept in repair by the road supervisor under the direction of the county court is admissible without showing an order of the court authorizing or directing him to keep them in repair, or that no record of such authority had been made, since under the statute the road supervisor is an officer of the county appointed by the county court, which has charge of highways and bridges, and it is his duty to keep the roads in repair.—*Ridings v. Marion County*, 30.

USE FOR TRAVEL—CONTRIBUTORY NEGLIGENCE.

2. Where a county constructs or maintains a bridge for use by the public, a traveler may assume, in the absence of information to the contrary, that he may safely travel over any portion of the bridge, and in doing so he is not guilty of contributory negligence.—*Ridings v. Marion County*, 30.

BURDEN OF PROOF.

IMPAIRMENT OF VESTED RIGHTS—STATUTORY CRIMES.

The rule which imposes upon the defendant the burden of proof in a prosecution for a statutory crime, does not violate any vested right which he possesses.—*State v. Kline*, 426.

Life Insurance—Suicide as a Defense. See INSURANCE, 1.

In a Prosecution for a Statutory Crime. See CONSTITUTIONAL LAW, 10.

In a Suit to Partition Lands. See PARTITION, 1.

On Carrier to Allege and Prove a Limited Liability. See CARRIER, 9.

On Grantee Where Conveyance is Attacked as Fraudulent. See FRAUDULENT CONVEYANCES, 1.

CARRIERS.

LOSS OF FREIGHT—ACTION—PLEA—ESTOPPEL.

1. In an action against a carrier for loss of freight, a plea of estoppel by reason of plaintiff having received the bill of lading after loss, and having forwarded it to defendant with his claim for damages, was insufficient, where it alleged no facts showing that defendant acted on the contents of the bill of lading to its prejudice, or that it was misled by anything plaintiff did with reference thereto.—*McGregor v. Oregon R. & N. Co.* 527.

FINDINGS—EVIDENCE—LIMITATION OF LIABILITY.

2. In an action against a carrier for loss of goods by fire, evidence held to support a finding that plaintiff never entered into a special contract, evidenced by a bill of lading limiting the carrier's liability.—*McGregor v. Oregon R. & N. Co.* 527.

BILL OF LADING EXECUTED AFTER LOSS.

3. Where, after loss of goods while in the possession of a carrier, it executed and sent to the shipper a bill of lading limiting the carrier's liability as a matter of convenience for the purpose of identifying the property lost, the shipper's receipt of such bill did not limit the carrier's common-law liability.—*McGregor v. Oregon R. & N. Co.* 527.

LIMIT OF LIABILITY.

4. Mere notice by a carrier to a shipper is insufficient to limit the carrier's liability, an express stipulation being necessary for that purpose.—*McGregor v. Oregon R. & N. Co.* 527.

CARRIER'S LIABILITY—WAREHOUSEMEN—DUTY OF CARRIER.

5. Where the consignee is present on the arrival of goods, he is required to receive them without unreasonable delay, or the carrier's liability as such is terminated. If the consignee is absent, but lives in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, after which he has a reasonable time to remove them; but if he is absent, unknown, or cannot be found, the carrier may place the goods in a warehouse, and after keeping them a reasonable time, if not delivered, the carrier's liability as such ceases.—*McGregor v. Oregon R. & N. Co.* 527.

REASONABLE TIME.

6. Plaintiff's agent learned of the arrival of the goods in question between 4 and 5 o'clock P. M., which was a few hours after the car in which the goods were transported reached destination. The shipping receipt had not arrived, and it was customary for the carrier's office to close at 6 P. M. Plaintiff did not remove the goods that night, during which they were destroyed by fire. Held, that the loss occurred before the expiration of a reasonable time for the removal of the goods as a matter of law.—*McGregor v. Oregon R. & N. Co.* 527.

QUESTION FOR COURT OR JURY.

7. Where the facts relating to the reasonableness of the opportunity offered to a consignee for the removal of goods after arrival are few and simple, and conclusively established, whether a reasonable time has or has not elapsed is a question for the court; it being proper to submit it to the jury only in case of a conflict in the testimony, or when the facts are doubtful or complicated, etc.—*McGregor v. Oregon R. & N. Co.* 527.

LOSS OF GOODS—DEFENSES—PLEADING.

8. A defense by a carrier that part of the goods sued for did not belong to plaintiff could not be proved where not specially pleaded.—*McGregor v. Oregon R. & N. Co.* 527.

LIMITATION OF LIABILITY—BURDEN OF PROOF.

9. A carrier being ordinarily an insurer of the goods it undertakes to transport, and all limitations of its common-law liability being in the nature of exceptions to its general responsibility, the burden is on the carrier to allege and prove a limited liability contract on which it seeks to relieve itself of its common-law liability.—*McGregor v. Oregon R. & N. Co.* 527.

CHANGE OF VENUE.

Affidavits For and Against Raises an Issue. See VENUE, 1.

CHARGING JURY. Same as INSTRUCTIONS TO JURIES.

CHARTER OF CITIES.

	{	§ 64, pp. 92, 98.
	{	§ 65, pp. 92, 98.
	{	§ 66, pp. 92, 98.
Newberg, Laws 1888.....	{	§ 82, pp. 92, 97.
	{	§ 110, pp. 92, 98.
	{	§ 189, pp. 92, 94.
Portland, Laws 1908.....	{	§ 48, pp. 461, 488.
Eugene. { Laws 1893.....	{	§ 127, pp. 468, 469.
{ Laws 1905.....	{	§ 114, pp. 468, 469.

CITIES. Same as MUNICIPAL CORPORATIONS.

CITY CHARTERS. Same as CHARTER OF CITIES.

CLAIM AND DELIVERY. Same as REPLEVIN.

CLUB. Sale of Liquors by. -See INTOXICATING LIQUORS, 2, 3, 4, 5.

CODE CITATIONS. See Table in Front of This Volume.

COLLATERAL ATTACK.

Of Service of Summons on Foreign Corporations. See JUDGMENT, 11, 12, 13.

CONSTITUTIONAL LAW.

CONSTITUTIONAL LIMITATION ON POWER OF LEGISLATURE TO CREATE MUNICIPAL CORPORATIONS.

1. The Constitution of Oregon, Art. XI, § 2, as amended in 1906, providing that corporations may be formed under general laws, and that the legislature shall not enact or repeal any charter or act incorporating any municipality, city or town, now prohibits the legislature from creating any corporation of any kind by a special act.—*Farrell v. Port of Columbia*, 169.

PORT OF COLUMBIA A SPECIAL PUBLIC ACT.

2. The act incorporating the Port of Columbia (Laws 1907, pp. 182, 190), is a special public act creating a corporation, and is in direct violation of Const. Or. Art. XI, § 2, as amended in 1906: *Dunn v. State University*, 9 Or. 357, and *Liggett v. Ladd*, 23 Or. 26, distinguished.—*Farrell v. Port of Columbia*, 169.

AMENDMENT OF STATE CONSTITUTION—SUBMISSION TO POPULAR VOTE.

3. Const. Or. Art. IV, Section 1, as amended in 1902, reserves to the people the power to propose amendments to the Constitution and to enact or reject them at the polls, independent of the legislative assembly, and provides that, on petition filed with the Secretary of State, the amendment shall be submitted to the people, and, if approved by a majority, shall become operative. Article XVII, Section 1, provides that an amendment to the Constitution may be proposed in the legislative assembly, and if agreed to by a majority shall be referred to the legislative assembly next to be chosen, and that if the amendment shall be agreed to by a majority of that legislative assembly the amendment shall be submitted to the voters, and if a majority of them shall ratify the same such amendment shall become a part of the Constitution. *Held*, that Article XI, Section 2, as amended in June, 1906, prohibiting the legislature from creating corporations by special laws, was legally adopted, though not twice submitted to and approved by the people; Article XVII, Section 1, having no reference to an amendment made under Article IV, Section 1.—*Farrell v. Port of Columbia*, 169.

EQUAL PRIVILEGES.

4. Laws 1905, p. 327, making it an offense to permit a female under the age of 21 years to remain in a saloon, is not invalid because of the fact that a female attains her majority at the age of 18; the right to enter and remain in a saloon not being one of the equal privileges granted to every citizen.—*State v. Baker*, 381.

DUE PROCESS OF LAW—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS.

5. The legislature may authorize a municipality to assess the expenses of street improvements on property benefited thereby, and such assessment is not a taking of property without due process of law, where the property owner is given an opportunity to be heard before the assessment is made.—*St. Benedict's Abbey v. Marion County*, 411.

LEGISLATIVE ACTION—DIRECTION—SELF-EXECUTING PROVISIONS.

6. Const. Or. Art. IV, § 1, as amended in 1902, reserving to the people initiative and referendum powers, and providing for the submission of legislation to the voters of the State or other political subdivision, is self-executing.—*Stevens v. Benson*, 269.

ENFORCEMENT—STATUTES.

7. Laws 1907, p. 399, providing the procedure to facilitate the enforcement of the initiative and referendum powers reserved to the people by Const. Or. Art. IV, § 1, as amended in 1902, was a proper exercise of legislative power, though the constitutional provision was self-executing.—*Stevens v. Benson*, 269.

OBLIGATION OF CONTRACTS—JUDGMENTS—DOWER.

8. A statute enlarging the dower estate is void as to pre-existing debts as withdrawing part of the judgment debtor's property from lien and sale, thus impairing the obligation of a contract.—*Davidson v. Richardson*, 323.

ENACTMENT—APPROVAL—CONSTITUTIONAL PROVISIONS.

9. The amendment of Section 1, Article IV, of the Constitution of Oregon (B. & C. Comp. p. 72), reserves to the people the initiative, the right to propose laws and amendments to the Constitution, and to enact or reject them at the polls, and the referendum, the right to approve or reject at the polls any act of the legislative assembly, and provides that the referendum may be ordered by petition or the legislative assembly; also that the veto power of the Governor shall not extend to measures referred to the people. Const. Oregon, Art. V, § 15, provides that every bill which shall have passed the legislative assembly, shall be presented to the Governor for his approval before it becomes a law. *Held*, that a law proposed by petition and enacted by the people under the initiative, need not be approved by the Governor.—*State v. Kline*, 426.

IMPAIRMENT OF VESTED RIGHTS—BURDEN OF PROOF—STATUTORY CRIMES.

10. The rule which imposes upon the defendant the burden of proof in a prosecution for a statutory crime does not violate any vested right which he possesses.—*State v. Kline*, 426.

DELEGATION OF LEGISLATIVE POWER—LOCAL OPTION LAW.

11. The local option law (Laws 1905, p. 41) is not unconstitutional as a delegation of legislative power, since the power to enact a law is not delegated, but authority was merely conferred upon the people of the counties to determine by a majority vote whether a law already passed for the entire State shall be applicable to such county, since it is the majority vote of the electors, and not the order of the county court, that effects the result, and the sale is forbidden by operation of the law.—*State v. Kline*, 426.

CONSTITUTION OF OREGON.

See Table in Front of This Volume.

CONSTITUTION OF THE UNITED STATES.

See Table in Front of This Volume.

CONTINUANCE.

DISCRETION OF COURT.

1. The granting or refusing an application for continuance is discretionary with the trial court.—*Pacific Mill Co. v. Inman*, 22.

CONDITIONS ON GRANTING.

2. Where a party has not incurred expense in preparation for trial, the court in granting a continuance on the motion of the adverse party may determine in its discretion whether terms shall be imposed.—*Pacific Mill Co. v. Inman*, 22.

CONTRACTS.

GUARANTY—CONSTRUCTION—PARTICULAR WORDS—EARNINGS.

1. A contract providing that, whereas guarantor had sold all the tools used in operating a log boom, together with the management thereof, and guaranteed that vendee should be secure in continuing the management thereof until the sum specified should be earned to vendee, that therefore guarantor and his surety agreed to pay vendee such sum less the amount earned, and signed by guarantor and his surety alone, meant that the net earnings of the management of the log boom and not the gross earnings were guaranteed to amount to the sum specified.—*Loomis v. MacFarlane*, 129.

CONDITION PRECEDENT—COMPLIANCE.

2. The condition of a guaranty that the earnings from the management of a log boom would amount to a sum specified provided that the guarantee should conduct the same in a faithful, business and workmanlike manner, was complied with, where the person guaranteed gave to the management of the boom his personal attention and rendered such reasonable personal services as he was able and qualified to render.—*Loomis v. MacFarlane*, 129.

CONSTRUCTION AGAINST PARTY USING WORDS.

3. Where the true meaning of a written instrument is doubtful, it should be construed most strongly against the party who used the doubtful terms.—*Loomis v. MacFarlane*, 129.

ACTION FOR BREACH—ISSUE—ABATEMENT.

4. Where, in an action for breach of a contract whereby plaintiff agreed to increase its capital stock and defendant agreed to buy a part thereof, the complaint alleges the issuance of the increased stock and the tender of a certificate of a part thereof to defendant, and the answer denies the allegations, the question of the validity of the increase of the stock is one of the very things in dispute and not a matter to be pleaded in abatement.—*Pacific Mill Co. v. Inman*, 22.

APPLICATION OF DOCTRINE OF RATIFICATION.

5. The doctrine of ratification operates only against the principal to a contract by way of estoppel, and applies solely to contracts that have been executed by the party asserting ratification.—*Pacific Mill Co. v. Inman*, 22.

CREATING A LIABILITY BY RATIFICATION.

6. A party to an executory contract cannot by a ratification of a void act create a liability in its favor against the other party to the contract, since before the ratification the contract was not mutual.—*Pacific Mill Co. v. Inman*, 22.

RESCISSION.

7. The fact that defendant, after contracting with plaintiff to cut grain, rented the land upon which the grain was to be grown to a tenant, who was to pay for the cutting of the grain, did not operate as a rescission of his contract with plaintiff, nor relieve him from liability thereon, since plaintiff was not a party to the second contract.—*Bade v. Hibberd*, 501.

ACTION FOR BREACH—EVIDENCE.

8. In an action to recover a balance due for services and for merchandise sold, evidence examined, and held for the jury.—*Bade v. Hibberd*, 501.

SALES OF STANDING TIMBER—CONSTRUCTION.

9. Where, at the time that a contract was entered into, providing for the removal of all "saw timber" from certain land, it is shown that no cord wood was being cut on the land or in the vicinity, and that one of the contracting parties was desirous of getting the timber for his mill and intended to set up the mill near the land, and the other parties sold him the timber with that in view, the term "saw timber" should be construed to exclude the right to cut timber for cord wood, and limited to timber suitable for being manufactured into lumber or other mill products; it not being until after the season of operation of the mill that defendant claimed the right to cut other timber.—*Roots v. Boring Junction Lum. Co.* 288.

CUTTING TIMBER—SUFFICIENCY OF EVIDENCE.

10. In an action to restrain the unlawful cutting of timber, evidence considered, and held sufficient to show that a contract on which defendant relied had been modified by a subsequent one of which defendant had knowledge.—*Roots v. Boring Junction Lum. Co.* 288.

CONTRIBUTORY NEGLIGENCE.

BRIDGES—USE FOR TRAVEL—CONTRIBUTORY NEGLIGENCE.

1. Where a county constructs or maintains a bridge for use by the public, a traveler may assume, in the absence of information to the contrary, that he may safely travel over any portion of the bridge, and in doing so he is not guilty of contributory negligence.—*Ridings v. Marion County*, 80.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ORDINARY CARE.

2. One is not guilty of contributory negligence, unless he fails to exercise ordinary care; and there is no want of ordinary care when, under the circumstances, he does not omit anything which an ordinarily prudent person similarly situated would not have omitted.—*Jackson v. Sumpter Valley Ry. Co.* 455.

BURDEN OF PROOF.

3. Contributory negligence is a matter of defense and the burden of establishing it is on defendant, unless plaintiff's declaration or the evidence establishes it.—*Jackson v. Sumpter Valley Ry. Co.* 455.

RAILROADS—INJURY TO ANIMALS.

4. Whether one is guilty of contributory negligence in turning his stock out to graze on uninclosed lands near a railroad track, is a question for the jury.—*Jackson v. Sumpter Valley Ry. Co.* 455.

CORPORATIONS.

FOREIGN CORPORATIONS—ACTIONS—JURISDICTION.

1. Before service of process on the president of a foreign corporation will confer jurisdiction, it must be made to appear that the corporation is doing business in the State, or is otherwise within its jurisdiction; but if the com-

pany is doing business in the State, or has an office therein in connection with its business, then the presence of an officer in connection therewith is the presence of the corporation.—*Knapp v. Wallace*, 348.

SERVICE ON FOREIGN CORPORATIONS—PRESUMPTIONS.

2. So long as a corporation confines its operations to the State within which it was created, and it has no office or transacts no business in this State, no presumption can arise that service on the president of the corporation within this State is service on the corporation.—*Knapp v. Wallace*, 348.

FOREIGN CORPORATIONS—SERVICE ON FOREIGN CORPORATIONS—VALIDITY OF SERVICE—STATUTORY PROVISIONS—JURISDICTION.

3. Section 55, B. & O. Comp., provides that in an action against a private corporation, summons shall be served by delivering a copy thereof, etc., to the president, etc., or in case none of the officers named shall reside or have an office in the county where the cause of action arose, then to any clerk, etc., who may reside or be found in the county, and if no such officer be found, then by leaving a copy at the residence, etc., of such clerk or agent. A complaint showed that defendant was a foreign corporation owning property in Josephine County in this State, and the return of service merely showed personal service on the president of the corporation in Multnomah County, without showing that it was made in the county where defendant corporation had its principal office or place of business, or that it was doing business in the State; and those facts did not appear in the record, though the decree recited an examination of the return made in the case, "wherefore, it is thereby and otherwise made to appear to the satisfaction of the court that the defendant corporation has been duly served with summons within the State." *Held*, that the record disclosed that there was no service on the corporation, and that the court acquired no jurisdiction over it; the decree in such a case will be held void on a collateral attack.—*Knapp v. Wallace*, 348.

ACTIONS AGAINST FOREIGN CORPORATIONS—JURISDICTION—SUFFICIENCY OF AFFIDAVIT FOR PUBLICATION.

4. Where an affidavit for publication shows that defendant, a foreign corporation, with its principal office and place of business in California, had theretofore been engaged in mining in Josephine County, but had ceased operations there, and had no officer or agent therein on whom service could be made, but that its officers reside and are in California, it is sufficient to show that service could not be made in this State, in view of Section 55, B. & O. Comp., providing that in actions against a private corporation summons shall be served by delivering a copy to the president or other head of the corporation, etc., or managing auditor, or in case none of the officers of the corporation above named shall reside or have an office in the county where the cause of action arose, then to any clerk, etc., who may reside or be found in the county, or, if no such officer be found, by leaving a copy, etc.—*Knapp v. Wallace*, 348.

AGREEMENT OF ORGANIZERS—WEIGHT OF EVIDENCE

5. Where plaintiff, defendants, and others holding an option on mining property, transferred it to a corporation formed by them, taking stock according to their interest in the option, and, the option expiring, defendants purchased the property on their own account, evidence in a suit to compel a conveyance to the corporation, *held* to show that it was agreed between the holders of the option, that the price of the property should be paid by the corporation, and not that plaintiff and defendants should pay for the property with their own funds, and defendants would not be required to convey to the corporation in payment of their stock.—*Gillett v. Dodge*, 552.

WHEN CORPORATION IS DE FACTO.

6. When business which might be transacted under its articles of incorporation has actually been carried on by an organization purporting to be a corporation, such organization is a *de facto* corporation.—*Leavenood v. McGee*, 238.

RIGHT TO ATTACK VALIDITY OF.

7. The legality of the organization of what appears to be at least a *de facto* corporation can be questioned by the State only and in a suit brought for that purpose.—*Leavenood v. McGee*, 238.

STOCK—"CERTIFICATE OF STOCK."

8. A certificate of stock is the written evidence of the right of a party to a *pro rata* share of the net profits of a corporation when declared, or to a like share of the assets after payment of its debts in case of dissolution of the corporation. Such certificates are not negotiable, but the owners may be estopped to assert title as against *bona fide* purchasers for value without notice.—*Beckwith v. Galice Mines Co.* 542.

TITLE—BONA FIDE PURCHASER—ESTOPPEL.

9. Plaintiff, pursuant to a contract for the sale of certain mining stock, sent the certificates, containing a power of transfer, duly signed, to a bank designated by the seller, with instructions that it should collect a draft attached for the price, and then deliver the certificates to the buyer. The bank was in fact a mere pretended institution, organized by the buyer to promote his criminal operations in securing possession of unlisted securities without paying therefor. The bank, without authority, delivered the certificates to the buyer, who immediately sold the stock for less than its value, and the stock after several transfers came into hands of defendants, who were *bona fide* purchasers for value. *Held*, that as plaintiff's intention was to transfer the title to the stock, and his voluntary act in delivering the stock to the bank, with the power of attorney executed in blank, thereby permitting the buyer to perpetrate the fraud, plaintiff was estopped to deny defendant's ownership.—*Beckwith v. Galice Mines Co.* 542.

UNAUTHORIZED INCREASE OF STOCK—RATIFICATION.

10. Where directors of a corporation have attempted without authority to increase the capital stock, or where the stockholders in an irregular manner have attempted to do so, such action may be ratified by the corporation.—*Pacific Mill Co. v. Inman*, 22.

Collateral Attack on Judgments Against Foreign Corporations. See JUDGMENTS, 11, 12, 13.

COSTS.

COSTS AND DISBURSEMENTS.

1. Under Section 566, B. & O. Comp., the allowance of costs and disbursements in the appellate court is entirely discretionary, and they will be awarded as different circumstances may seem proper.—*Brown v. City of Silverton*, 425.

COSTS IN EQUITY—APPEAL.

2. The Supreme Court may, in its discretion, assess the costs and disbursements of an appeal against the successful party, under Section 566, B. & O. Comp.—*Roach's Estate*, 179.

COSTS IN EQUITY.

3. In equity the costs and disbursements may be apportioned between the parties as the particular circumstances may render appropriate.—*Columbia Land Co. v. Van Dusen Invest. Co.* 59.

COURTS.

JURISDICTION OF COUNTY COURT TO COMPEL REPORT BY EXECUTOR.

1. Where an executor has admitted the jurisdiction of the county court by securing from it a confirmation of his appointment as executor, and recognized its authority by making to it semi-annual reports as required by statute, the county court is empowered to compel a final settlement, nothing having been done to defeat that right.—*Roach's Estate*, 179.

JURISDICTION OF CIRCUIT COURTS ON APPEALS IN PROBATE MATTERS.

2. Under Sections 555 and 558, Subd. 3, B. & O. Comp., providing that on appeal from the county court the proceedings shall be tried anew in the circuit court, and that the circuit court may give a final decree in the cause, a probate proceeding appealed from the county court is to be tried anew in the circuit court on all questions presented by a transcript of the entire record, the provision of section 556, that the appellate court may modify a decree "in the respect mentioned in the notice," being applicable only to appeals from circuit courts to the supreme court.

Under Section 1100, B. & O. Comp., providing that the procedure in the county court when exercising probate jurisdiction shall be in the nature of a suit in equity, the county court is not technically a court of equity, and the rule governing appeals from parts of decrees in circuit courts do not govern appeals from final decisions of the county courts in the settlement of estates.—*Roach's Estate*, 179.

JURISDICTION CANNOT BE WAIVED BY PARTIES.

3. Service and filing of notice of appeal are essential to give the Supreme Court jurisdiction, and cannot be waived by the parties.—*Rodman v. Manning*, 506.

COWHIDE.

Assault—Being Armed With and Gun. See ASSAULT AND BATTERY, 1, 2, 3.

CREDITOR'S SUIT.

NECESSITY OF LIEN BY PLAINTIFF.

1. To enable a creditor to maintain a suit to uncover hidden assets of a debtor, he must have a judgment or an attachment on specific property.—*Leavengood v. McGee*, 233.

CREDITORS' SUIT BY BANKRUPTCY TRUSTEE—BASIS OF SUIT.

2. A trustee in bankruptcy cannot maintain a suit in the nature of a creditors' bill until he has shown by the record of the referee in bankruptcy that the claims to enforce which the suit is brought have been ascertained and established in the manner provided by the bankrupt act.—*Leavengood v. McGee*, 233.

PLEADING FRAUD.

3. In pleading fraud more than a general allegation is necessary—facts must be specifically alleged showing actual fraud, or facts from which the law will construct fraud.—*Leavengood v. McGee*, 233.

CRIMINAL LAW.

AIDING AND ABETTING.

1. An instruction, on a prosecution for an illegal sale of intoxicating liquors, that defendant would be guilty if he aided or assisted another in effecting the sale in violation of law, is not error: B. & C. Comp. § 2153, declaring one who aids and abets in the commission of a crime to be a principal.—*State v. Carmody*, 1.

INSTRUCTIONS—ASSUMPTION OF FACTS.

2. The fact that the female was under the age of 21 years is not assumed by the instruction on a prosecution under Laws, 1905, p. 327, making it an offense to permit a female under such age to remain in a saloon; that the question to be determined was whether defendants were the owners of a saloon, and whether they permitted P. (the female), who was, in fact, under the age of 21 years, to remain in their saloon.—*State v. Baker*, 381.

MISLEADING INSTRUCTIONS.

3. Any remarks, gestures, facial expressions, tones of voice, or in fact any language which might seem even to hint at what the court thought of the merits of the case, should always be avoided at a trial of the issues before a jury.—*State v. Bartlett*, 440.

CONFESSIONS—ADMISSIBILITY.

4. A confession made to a public officer in answer to questions assuming accused's guilt, and while accused was imprisoned, is admissible, if voluntarily made, and there must be some accompanying circumstances calculated to produce fear to exclude it on the ground that it was produced by fear.—*State v. Blodgett*, 329.

SAME.

5. Accused, after being warned by the district attorney to the effect that whatever he said would be used against him, and that he need not make any statement unless he desired to, made a confession in answer to questions which assumed his guilt. Accused was in custody at the time. There was nothing to show accompanying circumstances calculated to produce fear. *Held*, that the confession was properly received in evidence.—*State v. Blodgett*, 329.

TRIAL—IMPROPER ARGUMENT OF DISTRICT ATTORNEY.

6. Improper remarks of the district attorney in his argument to the jury in a criminal case, to which no objection was made at the time, will not be considered on appeal.—*State v. Blodgett*, 329.

CONTROLLING ARGUMENT OF COUNSEL—OBLIGATION OF COURT.

7. The court in a criminal case must keep the attorneys for the State and accused within the bounds of legitimate argument and promptly check either when they exceed it, and, when improper argument is made, the court, on objection being made, must act and admonish the jury not to consider it.—*State v. Blodgett*, 329.

OBJECTIONS—SUFFICIENCY—ACTION OF COURT.

8. The court, on objection by the counsel for accused to the argument of the district attorney, stated that when accused's counsel came to address the jury he might challenge the correctness of the statements of the district attorney. The counsel subsequently objected to other remarks of the district attorney, and the court merely stated that the latter must confine his argument to the evidence. *Held*, that the action of the court was tantamount to overruling the objections to the argument, and, where accused's exceptions were included in the bill of exceptions, the matter was reviewable on appeal.—*State v. Blodgett*, 329.

IMPROPER ARGUMENT—GROUND FOR REVERSAL.

9. The rule that it is error sufficient to reverse a conviction for the court to suffer counsel, against objection, to state facts not in evidence or to comment on facts calculated to prejudice the jury, rests on the facts of each particular case as to what matters adverted to but not in evidence are pertinent to the issues, or what immaterial matters referred to may produce injury to the substantial rights of accused.—*State v. Blodgett*, 329.

SAME.

10. It is improper for the district attorney in his argument to the jury in a homicide case to refer to another criminal, who had killed his wife, his mother-in-law, and father-in-law in the county where accused was being tried, or to what other criminals may have done, and how they accomplished their crimes and the defense they made.—*State v. Blodgett*, 329.

SAME.

11. The refusal of the court to interfere, on objections being made to the improper argument of the district attorney in his argument to the jury in a homicide case, cannot be justified by the fact that accused's counsel had an opportunity to address the jury in reply, and might then refute the assertions of the district attorney.—*State v. Blodgett*, 329.

PREJUDICIAL ERROR.

12. A criminal case should not be reversed because of improper argument of counsel, unless it appears that injury to the rights of accused resulted, which question will be determined by the issue involved and the state of the evidence.—*State v. Blodgett*, 329.

CONFESSION—CONCLUSIVENESS.

13. A confession offered in evidence is not conclusive on accused, but he may disprove any statements therein, and the jury may give such weight to a confession as they deem proper on considering the circumstances connected therewith.—*State v. Blodgett*, 329.

DRUNKENNESS—EXCUSE FOR CRIME.

14. Drunkenness does not excuse accused for a criminal case, but it may be considered by the jury in determining the purpose, motive, or intent with which he committed the crime, to fix the degree of guilt.—*State v. Blodgett*, 329.

IMPROPER ARGUMENT OF COUNSEL.

15. Where, in a homicide case, there was evidence tending to show that accused, in consequence of drunkenness, was insane and deprived of the capacity for deliberation and premeditation essential to constitute murder in the first degree, the argument of the district attorney, in which he ridiculed the plea of insanity by stating the circumstances of other crimes committed in the same locality, for which the perpetrators suffered the extreme penalty of the law, was reversible error, where the court, notwithstanding the objections of accused, merely stated in its charge that the jury should disregard all matters that occurred during the trial that were not admitted in evidence.—*State v. Blodgett*, 329.

SAME.

16. It was improper for the district attorney in a homicide case to discuss the general character of accused and comment on his failure to call witnesses from another State to sustain good character, where accused had not testified in his own behalf, nor offered witnesses to show good character.—*State v. Blodgett*, 329.

MAP AS EVIDENCE.

17. A map of premises under consideration, made by a disinterested competent person, is admissible in evidence, though made by one who did not find sundry articles shown to have been picked up at points marked on the map, where the persons who did find the articles say the map is correct and shows truly the location they refer to in their testimony.—*State v. Remington*, 90.

NOT DUTY OF DEFENDANT TO ASK TO PLEAD.

18. In a criminal case defendant is not obliged to demand an opportunity to plead, but it is the imperative duty of the prosecuting officer to call upon him to do so.—*State v. Walton*, 142.

NECESSITY OF GUARDING RIGHTS OF DEFENDANT.

19. The public has an interest in the life and liberty of all persons accused of crime, and in criminal proceedings those steps which the law prescribes cannot be dispensed with or modified even with the express consent of the accused.—*State v. Walton*, 142.

NECESSITY OF ARRAIGNMENT AND PLEA.

20. Under Section 1828, B. & O. Comp., requiring one charged with a crime to be arraigned and to be asked whether he pleads guilty or not guilty, and

Section 1364, providing for entering the plea, it is essential to a conviction of a felony that the defendant be arraigned and that he plead or refuse to plead, though the defendant may not be affected in any degree by failing to plead.—*State v. Walton*, 142.

WAIVER OF OBJECTION OF INSUFFICIENCY OF EVIDENCE—MOTION TO ACQUIT.

21. An objection because of the insufficiency of evidence on a material point must specifically point out the defect or it will be considered waived.—*State v. Reyner*, 224.

TRIAL—INSTRUCTION AS TO DEGREES—NEED OF REQUEST.

22. Where a charge necessarily includes several degrees of crime, an instruction that the jury may find the defendant guilty of the lesser degree if they have a reasonable doubt of his guilt of the higher degree, must be specially requested or it need not be given: *State v. Cody*, 18 Or. 506, overruled.—*State v. Reyner*, 224.

EVIDENCE OF PREVIOUS CONVICTION AS AFFECTING CREDIBILITY.

23. Under Section 862, B. & O. Comp., providing that a witness may be impeached by the record of his previous conviction of a crime, a court may properly instruct the jury that the record of a previous judgment of guilty of a crime may be considered in determining the weight to be given to the testimony of a defendant.—*State v. Reyner*, 224.

Opinion Evidence Instead of Facts. See EVIDENCE, 17.

Incompetent Evidence May Become Competent. See EVIDENCE, 15.

Changing the Place of Trial. See VENUE, 1, 2.

CROSS-EXAMINATION.

Exhibits—When May Not be Offered. See WITNESSES, 4.

COURTESY.

Expenses for Benefit of Husband Not Chargeable to Estate. See EXECUTORS AND ADMINISTRATORS, 23.

DAMAGES.

ADMISSIONS BY AGENT—COMPETENCY.

1. In an action to recover for injuries to plaintiff's son, resulting from the lever of a log carriage becoming unfastened, statements by defendant's agent while reconstructing the mill, that the lever fastening was defective, was properly received, as notice of such defect to the agent was notice to defendant.—*Trickey v. Clark*, 516.

OPINION EVIDENCE—EXPERT TESTIMONY—WHEN PROPER.

2. In an action for injuries resulting from a lever being defectively fastened, the opinion of expert millmen as to the safety and propriety of the fastening was not necessary or competent, where the construction of the device was fully explained to the jury, and no particular skill was required to determine its safety.—*Trickey v. Clark*, 516.

MATTERS OF COMMON KNOWLEDGE.

3. In an action for injuries resulting from a lever being defectively fastened, testimony that the pin in the fastener was so loose that the jar of the mill worked it out, and that the fall of the fastener tended to knock it out, given in explaining the models of the lever and fastener to the jury, was not expert testimony.—*Trickey v. Clark*, 516.

DAMAGE—CONCLUSION OF WITNESSES.

Though a witness may state the facts upon which an alleged damage is predicated, he should not be allowed to give his opinion as to the amount of damages resulting from a given act, that being for the jury to determine.—*Montgomery v. Somers*, 259.

DEATH.

Involving Cause of Death of a Person who was Found Shot. See EVIDENCE, 19.

DECEDENTS' ESTATES. Same as EXECUTORS AND ADMINISTRATORS.

DEDICATION.

HIGHWAYS—PUBLIC LANDS—ACT OF CONGRESS CONSTRUED.

1. Section 2477, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1567], granting a right of way for highways over public lands not reserved for public uses, is an ex-

press dedication of a right of way, and an acceptance of the grant while the land is a part of the public domain may be effected by public user alone, without any action of the public highway authorities, and, when an acceptance thereof has once been made, the highway is legally established, and is thereafter a public easement upon the land, and subsequent entrymen and claimants take subject to such easement.—*Montgomery v. Somers*, 250.

STREETS—DEDICATION BY SALE OF PLATTED LOTS.

2. A sale of lots with reference to a plat showing a street is sufficient to complete a dedication of such street, subjecting it to any new servitude incident to it as a street.—*Oliver v. Newberg*, 92.

DEEDS.

CAPACITY OF GRANTOR.

1. A person otherwise competent who understands and appreciates the nature and effect of a proposed transaction is competent to execute a deed.—*Reeder v. Reeder*, 204.

EVIDENCE OF CAPACITY OF GRANTOR.

2. The evidence satisfactorily establishes that the grantor in the deed under consideration understood what she was about to do and intelligently accomplished a plan formed at some previous time.—*Reeder v. Reeder*, 204.

SUFFICIENCY OF DELIVERY—DEATH OF GRANTOR.

3. A deed is delivered if it is given into the possession of a third person, without any power to recall it or change its disposal, with instructions to deliver it to a specified person after the grantor's death.—*Reeder v. Reeder*, 204.

MORTGAGES—ABSOLUTE DEED—EVIDENCE.

4. In a suit to have a deed declared a mortgage, and for permission to redeem, on the claim that plaintiff transferred his interest in the contract for the deed to defendant only to secure a loan, evidence examined, and held sufficient to sustain the finding, that the transfer was intended as an absolute sale of plaintiff's interest in the contract.—*Cooper v. Strauber*, 556.

DELIVERY.

What Constitutes Delivery of Deed. See **DEEDS**, 3.

DEPOSITS IN COURT. See **TENDER**, 1, 2.

DEPOT GROUNDS.

Limits of, Are Questions for Jury. See **RAILROADS**, 5.

DISCRETION.

Amendment of Pleadings. See **PLEADINGS**, 11, 12, 15, 18.

Order of Hearing Proof. See **TRIAL**, 3, 6, 10.

Permitting the Filing of an Amended Reply. See **APPEAL**, 17.

As to Testimony in Rebuttal. See **EVIDENCE**, 23.

DIMINUTION OF RECORD.

Court May Allow Record to be Completed Rather than Dismiss the Appeal. See **APPEAL**, 22.

DOCUMENTARY EVIDENCE.

Manuscripts—Maps. See **EVIDENCE**, 13, 16.

DOWER.

OBLIGATION OF CONTRACTS.

1. A statute enlarging the dower estate is void as to pre-existing debts as withdrawing part of the judgment debtor's property from lien and sale, thus impairing the obligation of a contract.—*Davidson v. Richardson*, 323.

EFFECT ON INTERVENING RIGHTS INCHOATE DOWER RIGHT.

2. Although a *nunc pro tunc* entry of a judgment does not operate to create a lien from a date earlier than its actual entry to affect intervening rights of third persons, the possessor of an inchoate right of dower in land of the judgment debtor at the time judgment was rendered, who has not changed her condition upon faith in the record, has no such interest as entitles her to protection.—*Davidson v. Richardson*, 323.

DRUNKENNESS—

No Excuse For Crime, But May be Considered by Jury to Fix Degree of Guilt. See **CRIMINAL LAW**, 14.

DUE PROCESS OF LAW.

Expenses of Street Improvement on Property Benefitted. See CONSTITUTIONAL LAW, 5.

DUPLICITY.

When a Pleading is Duplicious. See PLEADING, 19.

EQUITY.

WHAT DECREE IS ENFORCEABLE AFTER APPEAL AND AFFIRMANCE—JURISDICTION TO MODIFY AFTER MANDATE.

1. After an equity case has been tried on appeal and the mandate of the Supreme Court with the appropriate decree entered in the trial court, the original decree ceases to have any force, the decree ordered by the appellate court takes its place, and the latter is not subject to any change or modification by the circuit court.—*Kraus v. Oregon Steel Co.* 88.

RIGHT OF SUPREME COURT TO MODIFY DECREE AFTER CLOSE OF TERM.

2. The rule that by the lapse of the term a court loses jurisdiction of a cause in which a final order has been entered, applies to the Supreme Court as well as to the circuit courts, and after the term the only power remaining in the Supreme Court is to recall the mandate for the purpose of correcting an error of the court, to settle the cost bill, or to determine some matter relating to the enforcement of the decree; there is no power to modify the decree or judgment in its essential feature.—*Kraus v. Oregon Steel Co.* 88.

JURISDICTION—WAIVER OF OBJECTION.

3. Where defendant, in a suit in equity, answers to the merits and asks equitable relief, he should not be permitted thereafter to question the jurisdiction on the ground of an adequate remedy at law; but, where the facts necessary to give jurisdiction are stated in the complaint but denied in the answer, without a prayer for affirmative relief, the question becomes one of fact, and is not waived by answering to the merits, and if want of jurisdiction appears during the trial the suit should be dismissed.—*Hume v. Burns*, 124.

RESTRAIN A TRESPASS.

4. Equity will interfere to restrain a trespass when the acts complained of will cause irreparable injury.—*Roots v. Horing Junction Lum. Co.* 294.

Costs and Disbursements in Equity Suits. See COSTS, 2.

ESTATES OF DECEDENTS.

When a Debt Due From Decedent's Estate is Subject to Garnishment. See GARNISHMENT, 1.

ESTOPPEL.

JUDGMENT AS AN ESTOPPEL.

1. A judgment for plaintiff, in an action of trespass, is only evidence that the title to some part of the premises was in the successful party, and, before he can avail himself of such judgment as an estoppel in another proceeding, he must show on what part of the premises the trespass was committed, and then apply the issue and judgment to the premises in controversy in the suit to enjoin.—*Hume v. Burns*, 124.

SILENCE AS AN ESTOPPEL—WANT OF RESULTING INJURY.

2. The mere silence of a party as to the location of the boundary of his property, or his refusal to state whether or not he has had a map made showing certain lines as dividing his property from that of his neighbor, does not create an estoppel against his proving the true location of such line.—*Columbia Land Co. v. Van Dusen Inv. Co.*, 69.

CARRIERS—PLEA OF ESTOPPEL.

3. In an action against a carrier for loss of freight, a plea of estoppel by reason of plaintiff having received the bill of lading after the loss, was insufficient, where it alleged no facts showing that defendant acted on the contents of the bill of lading to its prejudice, or that it was misled by anything plaintiff did with reference thereto.—*McGregor v. Oregon R. & N. Co.* 527.

TITLE—BONA FIDE PURCHASER—ESTOPPEL.

1. Plaintiff, pursuant to a contract for the sale of certain mining stock, sent the certificates containing a power of transfer, duly signed, to a bank designated by the seller, with instructions that it should collect a draft attached for the price, and then deliver the certificates to the buyer. The bank was in fact a mere pretended institution, organized by the buyer to promote his criminal operations in securing possession of unlisted securities without

paying therefor. The bank, without authority, delivered the certificates to the buyer, who immediately sold the stock for less than its value, and the stock, after several transfers, came into hands of defendants, who were *bona fide* purchasers for value. *Held*, that as plaintiff's intention was to transfer the title to the stock, and his voluntary act in delivering the stock to the bank, with the power of attorney executed in blank, thereby permitting the buyer to perpetrate the fraud, plaintiff was estopped to deny defendant's ownership.—*Beckwith v. Gallee Mines Co.* 542.

EVIDENCE.

ADMISSIBILITY OF EVIDENCE.

1. In a suit to determine an adverse claim to real estate, wherein plaintiff claimed title by adverse possession, evidence by defendant to establish her ownership by common reputation, referring principally to discussions among her neighbors, is inadmissible.—*Cooper v. Blair*, 394.

ORDER OF PROOF—STATUTORY PROVISIONS.

2. In an action by a bank on notes transferred to it without endorsement, admission of evidence tending to show that the original holder had agreed to cancel the notes before showing that the one transferring the notes to the bank had knowledge of the agreement, is not error, in view of Section 842, B. & O. Comp., providing that the order of proof shall be regulated by the sound discretion of the court. *First Nat. Bank v. McCullough*, 508.

PAROL EVIDENCE AS TO INDORSE—STATUTORY PROVISIONS.

3. The provision of the negotiable instrument law (Section 444, B. & O. Comp.) that, when an instrument is drawn or indorsed to a person as "cashier" of a bank, it is deemed *prima facie* to be payable to the bank of which he is such officer, and may be negotiated by the indorsement of either the bank or the officer, was based on the theory that the qualifying word creates an ambiguity as to the real party intended, to explain which, parol evidence is admissible; but, where a note is indorsed to N. without any qualifying word, even if N. is in fact the cashier of a bank, parol evidence is not admissible to show that the bank was the party intended as the indorsee.—*First Nat. Bank v. McCullough*, 508.

DAMAGES—CONCLUSION OF WITNESS.

4. Though a witness may state the facts upon which an alleged damage is predicated, he should not be allowed to give his opinion as to the amount of damages resulting from a given act, that being for the jury to determine.—*Montgomery v. Somers*, 259.

PRESUMPTION THAT TESTIMONY WILL SUPPORT VERDICT.

5. Where, in an action for damage to a growing hay crop by trespass, defendant's bill of exceptions to the ruling admitting testimony as to the value of the crop did not contain all the evidence, and there was no statement that testimony was not offered to show how many tons of hay the crop would have made, had it not been injured, or the cost of harvesting, it must be presumed that there was such testimony introduced sufficient to support the verdict.—*Montgomery v. Somers*, 259.

DUTY OF COURT TO REJECT UNREASONABLE TESTIMONY.

6. Where the undisputed circumstances show that the testimony of a witness is so improbable and unreasonable that a fair mind must reject it, the court should withdraw such testimony from the jury.—*Wolf v. City Ry. Co.* 61.

INJURY TO PERSONS ON TRACK—EVIDENCE.

7. In an action for the death of plaintiff's intestate, caused by his being struck by a street car, evidence examined, and that of a certain witness for plaintiff held not so opposed to all reasonable probabilities as to require its exclusion, as a matter of law, from the jury.—*Wolf v. City Ry. Co.* 64.

REASONABLENESS OF SPEED IS FOR JURY.

8. Whether a given speed was reasonable for a street car in a large city at a crossing in a residence district is a question that should be submitted to the jury.—*Wolf v. City Ry. Co.* 64.

EVIDENCE—SUFFICIENCY.

9. That at the time a pedestrian was struck by a street car there were seven persons at or near the crossing justifies an inference that the street was much used.—*Wolf v. City Ry. Co.* 64.

CONFESSIONS—ADMISSIBILITY—DETERMINATION OF COURT.

10. On the offer of a confession of accused, the court must determine whether it was made under the influence of hope or fear. This inquiry is preliminary to the admission of the evidence, and is addressed entirely to the judge.—*State v. Blodgett*, 329.

RULINGS ON EVIDENCE—STRIKING OUT.

11. The rule that the court should refuse to strike out irrelevant and immaterial evidence, admitted without objection, does not apply where a question does not call for improper evidence, but the answer contains evidence which is objectionable, and where it is not responsive or is too much in detail or proves to be hearsay, in which case the proper practice is to move to strike it out and to have the jury directed not to consider it.—*State v. Blodgett*, 329.

EVIDENCE—"PRIMA FACIE EVIDENCE" DEFINED.

12. "Prima facie evidence" is that degree of proof which, unexplained or uncontradicted, is by itself sufficient to establish the truth of a legal principle asserted by a party.—*State v. Kline*, 426.

ADMISSION OF MANUSCRIPT—ABSENCE FROM RECORD.

13. Where a manuscript sent up with a package of papers on appeal is not made a part of the bill of exceptions nor properly identified, it must be presumed that no error was committed in admitting it in evidence.—*State v. Kline*, 426.

PRESUMPTIONS—NOTICE TO PRODUCE ORIGINAL DOCUMENT.

14. B. & O. Comp., § 708, subd. 1, provides that secondary evidence of the contents of a writing may be given when the original is in the possession of the party against whom it is offered, and he withholds it after receiving reasonable notice to produce it, as required by section 771. A bill of exceptions on appeal in a prosecution for violating the local option law, showed that an internal revenue license was issued to defendants, and was in their possession, but it was not made to appear that any notice to produce it had been given to them. The only objection to parol proof of the contents of the license was that it was incompetent, immaterial, irrelevant, and not the best evidence. *Held*, that as want of notice was not suggested, it must be presumed in favor of the judgment rendered, that testimony as to the demand to produce the license was duly given.—*State v. Kline*, 426.

ORDER OF PROOF—RENDERING EVIDENCE COMPETENT BY SUBSEQUENT TESTIMONY.

15. Incompetent evidence that is improperly admitted may be made competent by later testimony, and thereby the original error will be corrected, the order of proof being a matter of discretion.—*State v. Remington*, 99.

MAPS DRAWN TO ILLUSTRATE A THEORY AS EVIDENCE.

16. A map on which is correctly delineated the premises referred to is not rendered incompetent because it has lines and marks intended to illustrate or support the theory of the party for whom it was made, the difference between the reality and the theory being properly explained.—*State v. Remington*, 99.

EXPRESSING OPINION INSTEAD OF FACTS.

17. It is competent for a qualified witness to express an opinion as to the proper deduction to be drawn from the facts shown in evidence where they are of such a nature that they cannot be clearly placed before a jury disconnected from the conclusion of the witness.

A witness, first shown to be competent, may state, on a criminal trial, his opinion as to whether a 30-30 rifle would make a hole the size of the hole in a picket from a fence shown him, notwithstanding it was admitted that the shooting was done with a 30-30 rifle, and though the picket and the bullet which struck the complaining witness, but which was mashed and battered, were received in evidence, such testimony not being subject to the objection that the question was one which the jury was as competent as witness to determine.—*State v. Remington*, 99.

ADMISSIONS OF AGENT.

18. Where local officers of a mutual benefit society are required to furnish proofs of death on the decease of a member of such local society, the statements and admissions of such officers, made against the interests of the general society, are competent evidence against it in an action on the benefit certificate.—*Hildebrand v. United Artisans*, 159.

RELEVANCY OF TESTIMONY.

19. In an action involving the cause of death of a person who was found shot, a hypothetical question asked of medical men as to when *rigor mortis* would set in where a person shot through the temple died almost immediately, is competent, relevant and material.—*Hildebrand v. United Artisans*, 159.

OBJECTIONS TO EVIDENCE—EFFECT.

20. An objection to the relevancy, competency and materiality of the subject-matter of a question waives any defects in its form.—*Hildebrand v. United Artisans*, 159.

COMPETENCY OF EXPERT.

21. A physician testifying as an expert must first be shown to be qualified either by actual experience in similar cases to the one put to him or by such careful and deliberate study as enables him to form a definite opinion of his own with reference to the matter under consideration.—*Hildebrand v. United Artisans*, 159.

RECORD OF ANOTHER CASE AS EVIDENCE—JUDICIAL NOTICE.

22. Courts do not take judicial notice of the records of other cases before them, therefore the papers in other proceedings must be offered in evidence to be available in a given case.—*Ollschlager's Estate*, 55.

EVIDENCE IN REBUTTAL.

23. Where plaintiff, an oller in defendant's mill, claimed to have been injured by the slipping of a plank in a platform constructed for his use, while it was defendant's theory that plaintiff was not performing his duties at the time he was injured, but was handling a loose conveyor belt, which had been removed from its pulley, and that it became entangled in the shaft while plaintiff was holding it, thereby causing the injury, plaintiff could prove in rebuttal that such conveyor belt was frayed at the edges, in order to warrant an inference that the belt was likely to get caught and wound around the shaft without human aid.—*Westman v. Wind River Lumber Co.* 187.

OBJECTIONS TO TESTIMONY IN EQUITY SUITS.

24. In equity suits, in order that objections to admission of testimony may be of any avail on appeal, they must be taken and noted in the trial court.—*Sutherland v. Bloomer*, 398.

SAME.

25. Where, at the trial, testimony is tendered, but objections thereto are sustained, the party offering the testimony may have it taken and recorded over the court's rulings, by offering to pay the additional expense incurred thereby in the event the proffered testimony shall finally be held inadmissible.—*Sutherland v. Bloomer*, 398.

SAME.

26. Where testimony is proffered, objections thereto sustained, and notwithstanding a request that it be taken and recorded, as provided in Section 406, B. & C. Comp., the court refuses to permit the testimony to be taken, and it shall on appeal appear that the rejected testimony is essential to a proper determination of the issues, the case may be remanded with directions to admit the desired testimony.—*Sutherland v. Bloomer*, 398.

SAME.

27. When objections are sustained to testimony offered, but recorded regardless of such ruling, and relying upon the correctness of the ruling of the court, no proof is offered in response to such testimony, and on appeal it shall be determined that the court erred in sustaining the objections thereto, the cause may be remanded for further proceedings, if deemed essential to a proper determination of the rights of the parties.—*Sutherland v. Bloomer*, 398.

PAROL—ADMISSIBILITY TO AFFECT WRITING.

28. Parol testimony is inadmissible to contradict, add to, detract from, or vary a written contract which is clear and explicit, and contains no latent ambiguities.—*Sutherland v. Bloomer*, 398.

CONSIDERATION.

29. Where the statement in a written agreement as to the consideration consists of a specific promise to perform certain acts, it cannot be modified by parol evidence; and so, where a written agreement recited the release of attachments as a consideration, but states no basis for an inference that the actions were to be dismissed, parol testimony is inadmissible to show the latter fact.—*Sutherland v. Bloomer*, 398.

ADMISSIONS BY AGENT—COMPETENCY.

30. In an action to recover for injuries to plaintiff's son, resulting from the lever of a log carriage becoming unfastened, statements by defendant's agent while reconstructing the mill, that the lever fastening was defective, was properly received, as notice of such defect to the agent was notice to defendant.—*Trickey v. Clark*, 516.

OPINION EVIDENCE—EXPERT TESTIMONY—WHEN PROPER.

31. In an action for injuries resulting from a lever being defectively fastened, the opinion of expert millmen as to the safety and propriety of the

fastening was not necessary or competent, where the construction of the device was fully explained to the jury, and no particular skill was required to determine its safety.—*Trickey v. Clark*, 516.

MATTERS OF COMMON KNOWLEDGE.

82. In an action for injuries resulting from a lever being defectively fastened, testimony that the pin in the fastener was so loose that the jar of the mill worked it out, and that the fall of the fastener tended to knock it out, given in explaining the models of the lever and fastener to the jury, was not expert testimony.—*Trickey v. Clark*, 516.

CONTRACT—ACTION FOR BREACH—EVIDENCE.

83. In an action to recover a balance due for services and for merchandise sold, evidence examined, and held for the jury.—*Bade v. Hibberd*, 501.

PAYMENT—PAYMENT BY CHECK—PAROL EVIDENCE TO EXPLAIN.

84. A memorandum on a check received in payment of merchandise sold that it is for the balance due on a particular item of indebtedness, is not conclusive on the seller, but may be explained by parol.—*Bade v. Hibberd*, 501.

PAROL EVIDENCE TO EXPLAIN A WRITING.

85. Where defendant placed in evidence during plaintiff's evidence in chief, a check alleged to be for balance due on a claim of plaintiff, and introduced evidence to show that plaintiff received the check without objecting to a memorandum thereon, the court could in its discretion allow plaintiff in rebuttal to testify that the memorandum was not on the check when he received it.—*Bade v. Hibberd*, 501.

CAPACITY OF GRANTOR.

86. The evidence satisfactorily establishes that the grantor in the deed under consideration understood what she was about to do and intelligently accomplished a plan formed at some previous time.—*Reeder v. Reeder*, 204.

EVIDENCE—BILL OF EXCEPTIONS.

87. Where the evidence is not in the bill of exceptions, and a transcript of what appears to be evidence is in the record, but the same is not identified by the court or certified to be any or all of the testimony in the case, the court on appeal will not consider it.—*Jackson v. Sumpter Valley Ry. Co.* 455.

Must be Clear and Convincing to Establish Resulting Trust. See TRUSTS, 5.
Of Resulting Trust May be Shown by parol. See TRUSTS, 2.

In Rebuttal. See MASTER AND SERVANT, 3.

Evidence Sufficient to Allow a Nonsuit. See TRIAL, 9.

Weight and Sufficiency of. See CORPORATIONS, 5.

That Transfer Was Intended as an Absolute Sale. See MORTGAGES, 1.

To Constitute Title by Adverse Possession. See ADVERSE POSSESSION, 1.

When Incompetent Evidence is Harmless. See APPEAL AND ERROR, 25.

EXCEPTIONS, BILL OF. Same as BILL OF EXCEPTIONS.

EXECUTION.

EXECUTION SALE—SETTING ASIDE—ACQUIESCENCE.

1. Parties acquiescing in the action of the court in setting aside an execution sale and ordering a resale are bound thereby.—*Miller v. Achurch*, 478.

PERSONS WHO MAY QUESTION VALIDITY OF SALE.

2. At common law the confirmation of a sale on execution might be objected to and the same set aside by plaintiff, defendant, or the purchaser.—*Miller v. Achurch*, 478.

SAME.

3. Under Section 242, Subd. 1, B. & O. Comp., providing that plaintiff in execution shall be entitled to an order confirming a sale thereunder, unless the judgment debtor or his representatives shall file objections, does not deprive any other interested person than the debtor of the right to object who by common law possessed that right; and hence plaintiff may object.—*Miller v. Achurch*, 478.

RESALE—STATUTORY PROVISIONS.

4. The mere fact that plaintiff in execution refused to receipt to the sheriff for the amount of his bid, or to credit his judgment, would not of itself be evidence of an abandonment or withdrawal of his bid, so that there would be in law no sale to him within Section 242, Subd. 1, B. & O. Comp., providing that on a resale, the purchaser's bid at the former sale shall be deemed renewed and to continue in force, and no bid shall be taken except for a greater amount.—*Miller v. Achurch*, 478.

NO RIGHT TO WITHDRAW BID ON EXECUTION SALE.

5. Property having been struck off to plaintiff in execution, he had no right to withdraw his bid, and could be excused only by an order of the court, and, if the sale was considered by the court regular, it had the power to enforce the same, and cancel the judgment *pro tanto*, notwithstanding plaintiff's refusal to receipt to the sheriff.—*Miller v. Achurch*, 478.

REALE—FORMER BID RENEWED.

6. Under Section 242, Subd. 1, B. & O. Comp., providing that on a resale on execution the purchaser's bid at the former sale shall be deemed renewed, and no bid shall be taken except for a greater amount, and by subdivision 3, providing for a repayment to the former purchaser, if the property sell for a greater amount to another, where the court in ordering a resale did not include therein any release of plaintiff in execution from his bid, he continued to be bound by it, and the sheriff was bound to consider it as renewed.—*Miller v. Achurch*, 478.

LIABILITY OF EQUITABLE INTEREST—JUDGMENT.

7. An equitable interest in real property is not subject to levy and sale on execution, and a judgment is not a lien thereon.—*Budd v. Gallier*, 42.

COMPLAINT INSUFFICIENT—JURISDICTION.

8. Under Section 56, B. & O. Comp., in an action on a note purchased by plaintiff at sale under execution, complaint held insufficient to show jurisdiction in the court rendering the judgment on which the execution was issued.—*Fishburn v. Londershausen*, 363.

EXECUTORS AND ADMINISTRATORS.

RELATION OF TO LEGATEES AND HEIRS.

1. In a general sense the relation of an executor to the legatees and others entitled to the estate is one of trusteeship.—*Roach's Estate*, 179.

RELATIVE RIGHTS OF EXECUTORS AND TRUSTEES.

3. Where an executor has lawfully secured possession of any property of his testator, he has the exclusive control over it until he has been discharged, and any interference therewith by another will be an intrusion on the rights of the probate court.—*Roach's Estate*, 179.

TERMINATION OF DUTIES AS EXECUTOR BEFORE BECOMING TRUSTEE.

4. Where an executor has been also appointed testamentary trustee, he should not assume to act in the latter capacity until he has settled his accounts as executor and been discharged.—*Roach's Estate*, 179.

EVIDENCE OF ASSUMING TRUSTEESHIP.

5. The evidence of a change of position from executorship to trusteeship should be some affirmative action, such as securing a release from the probate court and filing a trustee's bond. A mere ceasing to file reports as executor will not be sufficient.—*Roach's Estate*, 179.

JURISDICTION OVER OBJECTIONS TO ACCOUNTS.

6. Under Sections 1202 and 1203, B. & O. Comp., authorizing the filing of objections to the final account of an executor, "specifying the particulars of such objections," etc., the court on hearing objections to such final account is limited to the particular specifications set forth in the objections.—*Roach's Estate*, 179.

FINAL ACCOUNT—ITEMS PRACTICALLY CONCEDED AS ERROR.

7. Where an executor says he has no personal recollection of paying an item credited to his account, and the payee testifies that he did not receive it, the credit is properly disallowed.—*Roach's Estate*, 179.

INTEREST ON REJECTED CREDIT.

8. Where the objection to the allowance of a credit in an executor's final account does not require him to account for interest on the amount thereof, and there is no declaration in the exception of any sum due as compensation for the use of money on account of the item, interest should not be granted on the amount of the credit on the same being disallowed.—*Roach's Estate*, 179.

UNCHALLENGED ITEMS—REJECTION.

9. Unchallenged items on the credit side of an executor's final account cannot be rejected.—*Roach's Estate*, 179.

DUTY IN MANAGEMENT OF ESTATE.

10. An executor investing trust funds is not an insurer, but must exercise that degree of discretion which an intelligent person of ordinary prudence would observe in the management of his own affairs.—*Roach's Estate*, 179.

FINAL ACCOUNT—VALUE OF TESTIMONY OF INTERESTED PARTY.

11. On the issue whether an executor exercised proper care in loaning trust funds on security of a mortgage, the borrower is competent to testify, but his opinion cannot be considered the best evidence, for he is an interested person.—*Roach's Estate*, 179.

SETTLEMENT OF ACCOUNTS—BURDEN OF PROOF.

12. Where an executor's final account is properly challenged, the burden of proving the truth of an item or the reasonableness of a credit objected to is on him.—*Roach's Estate*, 179.

INVESTMENTS—LOSS—LIABILITY.

13. An executor loaned \$2,000 of trust funds, taking as security therefor a mortgage on 160 acres of unimproved land and 80 acres of alleged timber land, remote from markets and carrying only a small number of commercial trees. At a foreclosure sale, the tracts were sold at a sum insufficient to pay the debt. The borrower testified that he considered the loan adequately secured, but no other person so stated. *Held* sufficient to show want of proper care on the part of the executor in making the investment, rendering him personally liable for the loss.—*Roach's Estate*, 179.

LOAN ON INSUFFICIENT SECURITY.

14. A purchaser of land for \$5,000 paid two-thirds and gave two notes secured by a mortgage on the premises. An executor purchased with trust funds both notes. The mortgage was foreclosed, and a deficiency resulted. When the executor bought the first note, no depreciation in the value of the property had occurred, but at the time he purchased the second note the value of the premises had declined. The land had only a speculative value, was unimproved, and by reason of its situation had no real worth as a basis for security. *Held*, that the executor was personally liable for the loss.—*Roach's Estate*, 179.

SECOND MORTGAGE SECURITY.

15. Where a loss occurs to an estate by reason of a loan on a second mortgage security, the executor is personally liable for the loss.—*Roach's Estate*, 179.

ITEM UNDER CONSIDERATION.

16. An executor loaned money and took a second mortgage on lots and a mortgage on a 10-acre tract. The lots satisfied only the first mortgage. The executor took no steps to foreclose the mortgage on the 10-acre tract. No testimony of its value was given. *Held*, that the executor was properly chargeable with the loss, he failing to sustain the burden of proving the adequacy of the security.—*Roach's Estate*, 179.

DUTY TO AVOID STATUTE OF LIMITATIONS.

17. An executor failing to foreclose a mortgage taken as security for a loan of trust funds and allowing limitations to bar a recovery is personally liable for the loss to the estate.—*Roach's Estate*, 179.

ITEMS NOT OBJECTED TO.

18. In settling an executor's accounts items not objected to should not be reviewed.—*Roach's Estate*, 179.

LIABILITY FOR LOANS MADE WITHOUT SECURITY.

19. The loss of trust funds loaned without any security or on manifestly inadequate security is negligence, and an executor is personally liable for a failure to obtain a repayment of the moneys loaned, whether the loan was made before or after the passage of an act prescribing the manner of investing funds by a trustee, because such a proceeding does not disclose the prudence ordinarily exercised by intelligent men in their affairs.—*Roach's Estate*, 179.

FINAL ACCOUNT—REPORT AND OBJECTIONS THERETO.

20. A decree requiring an executor in the settlement of his final account to account for sums found to be due the estate must be based on his final account, the objections thereto and the proofs.—*Roach's Estate*, 179.

FINAL ACCOUNT—RIGHT TO FILE AMENDED OR FURTHER OBJECTIONS.

21. Legatees objecting to the final account of an executor are not limited to their original objections, but they may file additional or amended objections, or modify their demand, to correspond with the testimony.—*Roach's Estate*, 179.

INVESTMENTS—LOSSES—LIABILITY.

22. An executor bought a note for \$800, secured by a mortgage, and purchased the premises at foreclosure, and, after having received rents, sold the same for \$900. The executor's counsel offered a settlement on the basis that the sale of the premises was made to the executor in his own name, so that he should be personally charged with the money expended therefor and interest thereon. The court charged the executor with the sum paid for the note, the

interest thereon, the taxes paid, and expenses incurred on account of the property, and credited him with the sum received on the reale and the rent. *Held*, that the conclusion of the court should not be disturbed.—*Roach's Estate*, 179.

COMPENSATION—ALLOWANCE.

23. Where an executor did not apply to the county court for advice in the management of the estate, and for more than eight years made no report of his dealings, though required by B. & O. Comp. § 1199, to account semi-annually, the court properly denied him any extra compensation, office rent or attorney's fees.—*Roach's Estate*, 179.

OBJECTIONS NOT SPECIFIED.

24. Where the objections to the final account of an executor do not assign grounds urged on appeal, a denial of the relief sought by the objectors is not erroneous.—*Roach's Estate*, 179.

ACCOUNTING—TERMS OF DECREE.

25. Where an executor is held personally liable for losses from his investments of trust funds on insufficient security, and he has obtained for the estate title to the property taken as security, the legatees must quitclaim to him their claim to such property as a condition precedent to his paying the losses.—*Roach's Estate*, 179.

CONTINUED.

26. Where an executor, in satisfaction of mortgage debts, has accepted conveyances of the incumbered land and also foreclosed mortgages, and, on the sale, has taken deeds therefor to himself as executor, he must, as a condition precedent to his discharge and the release of his bondsmen, convey the premises to the legatees as tenants in common.—*Roach's Estate*, 179.

ADMINISTRATORS—FINAL ACCOUNT—VACATION—GROUND.

27. Where a husband was appointed administrator of his deceased wife's estate and fraudulently induced the heirs to advance their money to maintain the same, to acquiesce in the final account without examination, and withhold their claims against the estate, the heirs were entitled to have the final account vacated and the estate reopened.—*Johnson v. Savage*, 294.

EXECUTORS AND ADMINISTRATORS—EXPENSES.

28. If a husband's curtesy estate in the property of his deceased wife gives him possession to the exclusion of the administrator, the expenses of fencing the property, insurance on a building thereon, and other expenses for the benefit of the husband, are not chargeable against the estate.—*Johnson v. Savage*, 294.

INJUNCTION TO RESTRAIN VEXATIOUS LITIGATION.

29. Administratrix, at the time a proceeding for her removal was instituted in the county court by the county, claiming to be a creditor, was engaged in litigation over a claim for a large sum of money asserted by the county against the estate of which she was administratrix, and was making an honest and apparently successful defense thereto, and the county had been unable to establish its claim; and it was for the purpose of preventing administratrix from making such defense and to enable the county to succeed that it instituted a proceeding for her removal. The county judge had been very active in the county's behalf, and it was under his direction that the litigation against the estate was being conducted. *Held*, that administratrix was entitled to enjoin the prosecution of the proceeding for her removal, the case presented being one that appealed strongly to equity.—*Alderman v. Tillamook County*, 48.

PROCEEDINGS IN OTHER COURTS—ADEQUATE REMEDY.

30. In a suit by an administratrix to restrain a probate judge and an alleged creditor of an estate in his court from taking further steps in a proceeding before said judge to remove plaintiff on the ground that the judge had conspired with the alleged creditor and agreed to make such removal regardless of the facts and of the law, the right of plaintiff to contest the application and appeal from the order of removal is not such an adequate remedy as to bar the equitable remedy of enjoining vexatious and unjust litigation.—*Alderman v. Tillamook County*, 48.

ADMINISTRATORS—FINAL ACCOUNT—RIGHTS OF OBJECTORS.

31. Where persons claiming to be heirs file objections to an administrator's final account, they are entitled to have them disposed of in a proper and orderly way, and not summarily dismissed on the unsupported assumption that they are not heirs.—*Ollschlager's Estate*, 55.

RECORD OF ANOTHER CASE AS EVIDENCE.

32. Where objections have been filed to an administrator's final account, the record in a previous guardianship proceeding in the same court cannot be considered in determining whether the objectors are heirs, unless it is received in evidence after being properly offered.—*Ollschlager's Estate*, 55.

EXHIBITS.

WITNESSES—OFFERING EXHIBITS ON CROSS-EXAMINATION.

1. Where a witness has referred to documents on direct examination, the opposite party has a right to have such documents identified and marked as a part of the cross examination, but it is very doubtful whether they can then be offered in evidence.—*Hildebrand v. United Artisans*, 159.

FALSE PRETENSES.

LARCENY—FALSE PRETENSES—DISTINCTION.

1. Where possession of personal property is obtained from the owner by fraud, trick, or device, and the owner intends to part with both possession and the title when he surrenders control of the property, the offense is obtaining property by false pretenses; but if the possession is fraudulently secured, and the owner does not intend to part with the title, the offense is larceny.—*Beckwith v. Galice Mines Co.* 542.

FENCES.

Depot Grounds Not Required to be Fenced. See RAILROADS, 5.

FINDINGS.

PRACTICE.

1. It is not contemplated by the statute that findings of fact and conclusions of law shall be made by the trial court where judgment is had on the pleadings, or for want of an answer.—*Sutherland v. Bloomer*, 338.

Equivalent to Special Verdicts. See TRIAL, 4.

Where They Support Judgment for Defendant. See REPLEVIN, 1.

Failure of Trial Court to Make Findings. See APPEAL AND ERROR, 38.

FORCEIBLE ENTRY AND DETAINER.

APPEAL—SUFFICIENCY OF UNDERTAKING—PRESUMPTION.

1. Where on judgment for plaintiff in a forcible entry and detainer action defendants gave a bond under the express terms of Section 5754, B. & O. Comp., guaranteeing payment of twice the rental value of the land should judgment be affirmed, the undertaking must be presumed sufficient for the objects given, and is effectual for all purposes until the final determination of the cause, in the absence of objections or exceptions thereto.—*Wolfer v. Hurst*, 218.

INJUNCTION—REMEDY AT LAW.

2. Where a defendant in forcible detainer has given the statutory bond for double rent, such bond affords an adequate remedy at law for the damage caused by seizing the crop pending the appeal, and bars an injunction to prevent removing such crop before the final determination of the law action.—*Wolfer v. Hurst*, 218.

INSOLVENCY—BOND ON APPEAL.

2. The insolvency of a defendant in a forcible entry and detainer action is immaterial in a suit to enjoin him from removing chattels from the premises in question pending the determination of such action, where the defendant appealed from the judgment and gave a bond for double the rental value and for restitution.—*Wolfer v. Hurst*, 218.

FRAUD.

ACTION—COMPLAINT—SUFFICIENCY.

1. In an action for fraud against a state land commissioner and agents, a count of a complaint which alleges that plaintiff was led by two of the defendants to buy information of the other that certain school sections lost to the State were mineral in character, when, in fact, they were not mineral in character, and the information was false, and that having selected lieu land thereon, his application was not approved by the United States Land Department, but does not allege that the defendants by whom he was induced to purchase the information, knew the kind of information possessed by the one selling it, nor in any way became liable as guarantors of or parties to the representations made him, does not state a cause of action against them.—*Summers v. Geer*, 249.

REPRESENTATIONS—RELiance—FIDUCIARY RELATIONS.

2. The rule that a person is guilty of negligence in relying on statements or representations of another as a basis of a contract or transaction, does not apply to parties occupying the relation of trust or confidence, such as parent and child, or guardian and ward.—*Johnson v. Savage*, 294.

DEGREE OF PROOF REQUIRED.

3. Fraud must be clearly and satisfactorily proven to support a decree.—*Scott v. White*, 111.

Vacating Final Account of Administrators. See EXECUTORS AND ADMINISTRATORS, 27.

FRAUDULENT CONVEYANCES.

SETTING ASIDE—BURDEN OF PROOF.

1. Where a conveyance by a debtor to his brother is attacked as fraudulent as to creditors, the burden is on the grantee to allege and prove that he purchased without notice of the fraudulent intent and for a valuable consideration.—*Strubling v. Wilson*, 282.

SUFFICIENCY OF EVIDENCE.

2. In an action to set aside a conveyance as fraudulent as to creditors, evidence examined, and held sufficient to show notice to the grantee of the fraudulent intent of the grantor at the time of the execution of the deed.—*Strubling v. Wilson*, 282.

CONVEYANCE FRAUDULENT AGAINST SUBSEQUENT CREDITORS.

3. Constructive fraud will not support a suit by subsequent creditors to set aside conveyances; as to them the fraud must have been specific and actual.—*Leavengood v. McGee*, 238.

SUFFICIENCY OF EVIDENCE.

4. The evidence in this case does not satisfactorily show the fraud claimed, and is not sufficient to support a decree for plaintiff.—*Leavengood v. McGee*, 238.

GARNISHMENT.

CLAIMS NOT SUBJECT TO GARNISHMENT—INDEBTEDNESS OF ESTATE.

1. A debt due from decedent's estate is not subject to garnishment until the share of the creditor, heir, or legatee, has been ascertained and ordered paid by the court, prior to which the money or funds of the estate are in *custodia legis*, and not subject to levy.—*Thorsen v. Hooper*, 497.

GOOD FAITH.

See MALICIOUS PROSECUTION, 3, 4.

See VENDOR AND PURCHASER, 1.

See WORDS AND PHRASES, 2.

GOVERNOR.

VETO POWER—ABSENCE OF CONSTITUTIONAL PROVISIONS.

1. In a democratic form of government, the authority of an executive to veto an enactment of the legislative department, is not an inherent power, and can be exercised only when sanctioned by a constitutional provision.—*State v. Kline*, 426.

ENACTMENT—APPROVAL—CONSTITUTIONAL PROVISIONS.

2. The amendment of Section 1, Article IV, of the Constitution of Oregon (B. & O. Comp. p. 72), reserves to the people the initiative, the right to propose laws and amendments to the Constitution, and to enact or reject them at the polls, and the referendum, the right to approve or reject at the polls any act of the legislative assembly, and provides that the referendum may be ordered by petition or the legislative assembly; also that the veto power of the Governor shall not extend to measures referred to the people. Const. Oregon, Art. V, § 15, provides that every bill which shall have passed the legislative assembly, shall be presented to the Governor for his approval before it becomes a law. Held, that a law proposed by petition and enacted by the people under the initiative, need not be approved by the Governor.—*State v. Kline*, 426.

GUARANTY.

CONSTRUCTION—PARTICULAR WORDS—EARNINGS.

1. A contract providing that, whereas guarantor had sold all the tools used in operating a log boom, together with the management thereof, and guaranteed that vendee should be secure in continuing the management thereof until the sum specified should be earned to vendee, that therefore guarantor and his surety agreed to pay vendee such sum less the amount earned, and signed by guarantor and his surety alone, meant that the net earnings of the management of the log boom and not the gross earnings were guaranteed to amount to the sum specified.—*Loomis v. McFarlane*, 129.

CONDITION PRECEDENT—COMPLIANCE.

2. The condition of a guaranty that the earnings from the management of a log boom would amount to a sum specified provided that the guarantor should conduct the same in a faithful, business and workmanlike manner, was complied with, where the person guaranteed gave to the management of the boom his personal attention and rendered such reasonable personal services as he was able and qualified to render.—*Loomis v. McFarlane*, 129.

HARMLESS ERROR.

- Effect of Rejecting Evidence Subsequently Received. See **APPEAL**, 44.
 When Failure to Make Findings is Not Reversible Error. See **APPEAL**, 38.
 Modifying Temporary Injunction Without Notice. See **APPEAL**, 41.
 Opinion as to Amount of Damages From Trespass. See **APPEAL**, 25.

HIGHWAYS.**ROAD IMPROVEMENTS—ASSESSMENTS—BENEFITS**

1. The expenses of road improvements can be assessed against lands benefited only in proportion to benefits, and an act authorizing the assessment of a portion of the expense without reference to benefits is invalid. Act February 22, 1905 (Laws 1905, p. 410), providing for the improvement of roads, the expenses of which are to be assessed on real estate adjacent thereto and benefited thereby, according to the benefits, etc., limits the assessment to lands benefited by the improvement, and in proportion to such benefits and is valid.

—*St. Benedict's Abbey v. Marion County*, 411.

BENEFIT DISTRICTS—POWER OF LOCAL BOARD OF VIEWERS.

2. The legislature, in providing for the payment of road improvements by assessment on property benefited, may fix the sum to be raised, and prescribe the benefit district, or it may delegate one or both of the questions to a local board of viewers, and has a wide discretion in providing for road improvements at the cost of property benefited, and prescribing the taxing district, and delegating to local boards of viewers power to determine the extent of the benefits and the manner of apportioning the expense, and its action will not be disturbed, unless it clearly appears that it has exceeded its constitutional authority, its taxing power being unlimited except as restricted by the federal constitution.—*St. Benedict's Abbey v. Marion County*, 411.

"ROAD"—OVERLAPPING LANDS.

3. The word "road" in Act February 22, 1905 (Laws 1905, p. 414), § 7, providing that where any "road" has been constructed under the act providing for the improvement of roads at the expense of the property benefited thereby, and another "road" shall be thereafter constructed within four miles thereof, the amount to be assessed against all lands included within the overlapping two-mile lines of each road shall be equitably determined by the county court, on the report of the viewers and appraisers, means the portion improved, and the improvement of any other portion of the same road is another road, and lands within the overlap are protected from unequal burdens.—*St. Benedict's Abbey v. Marion County*, 411.

APPEAL—RIGHT TO QUESTION ACTION OF VIEWERS.

4. Since Act February 22, 1905 (Laws 1905, p. 410), providing for the improvement of roads at the cost of lands benefited thereby, gives a landowner within the taxing district opportunity to question the action of viewers as to whether his land is benefited, or as to how much it may be benefited, and as to whether the assessment on his land is proportionate to the benefits, and gives him a right to appeal to the circuit court, equity will not interfere, unless the method adopted in estimating the benefits and assessing the expenses amounts to a fraud on him, the remedy provided by the statute being otherwise exclusive.—*St. Benedict's Abbey v. Marion County*, 411.

TRESPASS—TRIAL—INSTRUCTIONS.

5. Where, in trespass to land, defendants relied upon its user for several years as a highway while the land was public domain, an instruction that by United States statute a right of way for highways is granted over public lands, and long-continued user by the public is "sufficient" to establish an acceptance of the grant, was not objectionable as declaring long-continued user "essential" to the establishment of the highway.—*Montgomery v. Somers*, 259.

ESTABLISHMENT BY USER—PUBLIC IMPROVEMENT.

6. If a highway has been generally traveled, and has been improved by the public authorities as a county road for a period of ten years or more, it is a legal county road.—*Ridings v. Marion County*, 80.

INSTRUCTION—TRAIL OR DEFINITE PATH A PUBLIC HIGHWAY.

7. An instruction in trespass that if, while the land over which a trail lies was public land, the public "for a long period, viz., ten years or more," used as a public highway a definite path, it thereby became a public highway, was not objectionable as declaring such user necessary to the establishment of a highway.—*Montgomery v. Somers*, 259.

PRESCRIPTIVE RIGHT—WIDTH.

8. Where the right to a highway depends solely upon user by the public, its width is measured by the extent of the user; but the public will not be con-

fined to the track made by vehicles, etc. And, on the other hand, the public cannot acquire a prescriptive right to pass over land generally; but the user must be by way of a certain well-defined line of travel, not including, however, all the land over which loose stock being driven travel promiscuously, though in a generally uniform direction.—*Montgomery v. Somers*, 259.

NOT REVERSIBLE ERROR TO INSTRUCT.

9. Though the extent of user and reasonable width of a highway claimed by the public is generally for the jury, where defendants justified a trespass to land on user for several years by drovers, etc., as a highway, while it was public domain, in view of Section 4790, B. & O. Comp. (Laws 1903, p. 267), providing that all county roads shall be 60 feet wide, etc., it was not reversible error to instruct that, if the trail was a legal highway, it must be considered of reasonable width for the convenient use of the public, not exceeding 60 feet.—*Montgomery v. Somers*, 259.

Right of Way Over Public Lands. See PUBLIC LANDS, 8.

Control of Highways Within City Limits. See MUNIC. CORP. 4.

Property Benefited by Road Improvement. See STATUTES, 6.

What Streams Are Public Highways. See WATERS, 1.

Where County Maintains Road and Bridge. See BRIDGES, 1, 2.

HOMICIDE.

ASSAULT WITH INTENT TO KILL—EVIDENCE OF EXTENT OF INJURY.

1. On a trial for assault with intent to kill, a physician who attended the injured person may state the nature and extent of his injuries, since such evidence tends to explain the extent and nature of the attack and its purpose.—*State v. Remington*, 99.

ASSAULT WITH INTENT TO KILL—INSTRUCTION ON SELF-DEFENSE.

2. On a trial for assault with intent to kill, it appeared that ill feeling had existed between the complaining witness and defendant, and that defendant knew that complaining witness had threatened to take his life and went armed for that purpose; that defendant, having occasion to call on one who lived beyond complaining witness' farm, selected a route which took him across complaining witness' farm, but which route persons living in that vicinity had used without objection, and that defendant carried with him a rifle. Held to warrant a charge that one cannot claim self-defense if he intentionally put himself where he knew he would have to invoke its aid, that if defendant could have avoided any conflict without increasing the danger to himself it was his duty to do so, and that if defendant sought the conflict, and the prosecuting witness showed fight and used a deadly weapon, or did an act in such a way as if about to engage in an affray, he could not invoke the law of self-defense until he had first retreated as far as he could with safety to himself.—*State v. Remington*, 99.

INCONSISTENT DEFENSES.

When Defenses Need Not be Consistent. See PLEADING, 6.

INDICTMENT AND INFORMATION.

OBJECTION AT TRIAL FOR INSUFFICIENCY.

1. Under Section 1365, B. & O. Comp., an objection to an indictment because the facts therein stated do not constitute a crime may be made at the trial under a plea of not guilty.—*State v. Reyner*, 224.

WAIVER OF OBJECTION OF DUPLICITY.

2. Though an indictment is open to demurrer if the facts stated constitute more than one crime, or one crime in several forms, an objection on that ground must be taken by demurrer or it is waived.—*State v. Reyner*, 224.

SUFFICIENCY OF DULICITIOUS INDICTMENT TO SUPPORT CONVICTION.

3. No demurrer having been filed to an information charging more than one offense, they not being inconsistent, a conviction of the lesser of the two will be sustained.

An information charging larceny from a store, a compound larceny, and also alleging the value of the property, not being demurred to as charging two offenses, will sustain a verdict and judgment based on a simple larceny; the verdict determining the value of the property taken.—*State v. Reyner*, 224.

ASSAULT BEING ARMED WITH A COWHIDE.

4. The crime of "assault being armed with a cowhide," denounced by Section 1766, B. & O. Comp., declaring a punishment if any person shall assault another "with a cowhide, whip, stick, or like thing," under certain conditions, is not charged by an information which, in the preliminary part, names

defendants' offense as "assault, being armed with a leather strap," and in the charging part states that they, being armed with a leather strap, assaulted a person, a description of the leather strap being necessary to show that it was a like thing to a cowhide, whip, or stick.—*State v. Taylor*, 449.

PLEADING EXCEPTIONS.

5. Exceptions and provisos in criminal statutes need not be pleaded in indictments unless they are descriptive of the offense or necessary to its definition.—*State v. Carmody*, 1.

INTOXICATING LIQUORS—INDICTMENT—BEVERAGE.

6. Under the general rule that an indictment for a statutory misdemeanor is sufficient if it follows the words of the statute and is reasonably certain in its description of the offense intended to be charged, an indictment charging that defendant did "sell and give to one Q six bottles of intoxicating liquor with an intent and purpose of evading the local option law," etc., is not defective in failing to show that the liquor was intended as a beverage, since those are the words of the statute.—*State v. Carmody*, 1.

INFORMATION—WAIVER OF DEFECTS—DUPLICITY—FAILURE TO DEMUR.

7. Where an information charged defendants with selling "and" giving away intoxicating liquors with intent to evade the law, a failure to demur on the ground of duplicity in the specification of the charge, was a waiver of any defect on that account.—*State v. Kline*, 426.

INITIATIVE AND REFERENDUM.

STATUTES—DIRECTORY PROVISIONS.

1. Laws 1907, p. 399, providing for the carrying into effect of the initiative and referendum powers reserved to the people, provided (section 1) a form of petition, which was required to be substantially followed. The form contained a warning clause that it was a felony for any one to sign any such petition with any name other than his own, or to knowingly sign his name more than once to the same measure, or to sign such petition when he was not a legal voter. Section 2 of same act declares that the form given was not mandatory, and if substantially followed in any petition it will be sufficient, regardless of clerical or mere technical errors. *Held*, that the form, in so far as it contained the warning clause, was merely directory, and that a referendum petition omitting such clause was not thereby fatally defective.—*Stevens v. Benson*, 260.

STATUTES—REFERENDUM—PETITION.

2. Laws 1907, p. 399, § 1, provides a form of petition for the carrying into effect of the referendum powers reserved to the people, and section 2 declares that every sheet of the petition for petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed by the initiative petition, but such petition may be filed with the Secretary of State in numbered sections, for convenience in handling, and referendum petitions shall be attached to a full and correct copy of the measure on which the referendum is demanded and may be filed in numbered sections in like manner. *Held*, that, while an initiative petition is required to contain a correct copy of the title of the act, a referendum petition containing a full and correct copy of the act without the title is sufficient.—*Palmer v. Benson*, 277.

INJUNCTION.

WASTE—TRESPASS.

1. Equity will interfere to restrain a trespass or stay waste threatened or being committed, where the acts complained of amount to substantial injury or destruction of the estate, or will cause irreparable damage to the plaintiff, as cutting timber, removing ore, and the like.—*Roots v. Boring Junction Lum. Co.*, 298.

TRESPASS—CUTTING TIMBER—SUFFICIENCY OF EVIDENCE.

2. In an action to restrain the unlawful cutting of timber, evidence considered, and *held* sufficient to show that a contract on which defendant relied had been modified by a subsequent one of which defendant had knowledge.—*Roots v. Boring Junction Lum. Co.*, 298.

PARTIES.

3. In a suit to enjoin defendant from cutting and removing timber from land belonging to plaintiff, one who was in no way interested in the subject-matter of the litigation, and whose connection with the matter was only because defendant's interest in the contracts in controversy were secured through him, was not a necessary party.—*Roots v. Boring Junction Lum. Co.*, 298.

EFFECT OF INJUNCTION RESTRAINING LITIGATION IN OTHER COURTS.

4. An injunction in a suit to enjoin litigation does not interfere with the jurisdiction of the court in which such litigation is pending, but operates on the parties, preventing them from taking further proceedings.—*Alderman v. Tillamook County*, 48.

PROCEEDINGS IN OTHER COURTS—ADEQUATE REMEDY.

5. In a suit by an administratrix to restrain a probate judge and an alleged creditor of an estate in his court from taking further steps in a proceeding before said judge to remove plaintiff on the ground that the judge had conspired with the alleged creditor and agreed to make such removal regardless of the facts and of the law, the right of plaintiff to contest the application and appeal from the order of removal is not such an adequate remedy as to bar the equitable remedy of enjoining vexatious and unjust litigation.—*Alderman v. Tillamook County*, 48.

INJUNCTION—REMEDY AT LAW.

6. Where a defendant in forcible detainer has given the statutory bond for double rent, such bond affords an adequate remedy at law for the damage caused by seizing the crop pending the appeal, and bars an injunction to prevent removing such crop before the final determination of the law action.—*Wolfer v. Hurst*, 218.

ENJOINING A TRESPASS.

7. To justify a court of equity in enjoining a trespass it must appear that an irreparable injury will be inflicted unless the writ is issued.—*Wolfer v. Hurst*, 218.

Wrongfully Issued by Tenant to Maintain Possession. See LANDLORD AND TENANT, 3.

INSOLVENCY.

Not Ground for Injunction. See TRESPASS, 3.

INSTRUCTIONS TO JURIES.

TRAIL OR DEFINITE PATH A PUBLIC HIGHWAY.

1. An instruction in trespass that if, while the land over which a trail lies was public land, the public "for a long period, viz., ten years or more," used as a public highway a definite path, it thereby became a public highway, was not objectionable as declaring such user necessary to the establishment of a highway.—*Montgomery v. Somers*, 250.

TRIAL—INSTRUCTIONS—SUFFICIENCY OF AS A WHOLE.

2. Where an instruction as a whole clearly states the law as to the measure of damages for personal injury, and the jury could not have been misled thereby, it will not be held insufficient on account of the wording of a portion thereof.—*Ridings v. Marion County*, 30.

MALICIOUS PROSECUTION—DUTY TO INSTRUCT AS TO PROBABLE CAUSE.

3. In actions for malicious prosecution, where the facts are admitted or established, it is the duty of the trial judge to declare their legal effect, and not to leave that matter to the untrained judgment of a jury.—*Pulnam v. Stalker*, 210.

TRIAL—INSTRUCTIONS—FAILURE TO REQUEST.

4. Where a party did not request a direct instruction upon a point, he should not complain of the court's failure to instruct thereon.—*Trickey v. Clark*, 516.

INSTRUCTIONS—CREDIBILITY OF TESTIMONY OF ACCUSED.

5. The court instructed that an accused is deemed a competent witness, and that while the jury should give his testimony such weight and credibility as they might consider it entitled to, yet they were to consider in connection therewith that accused was testifying in his own behalf; that they were not bound to consider his testimony as absolutely true, nor as equal to the testimony of a disinterested witness, but to bear in mind that defendant spoke in his own behalf, and that the jury should consider the great temptation which one so situated was under, so to speak, as to procure his acquittal. Held, that the instruction was erroneous, as seeming to leave an implication that it was incumbent on the jury to consider defendant's testimony as false, and for that reason to reject it.—*State v. Bartlett*, 440.

MISLEADING INSTRUCTIONS.

6. Any remarks, gestures, facial expressions, tones of voice, or in fact any language which might seem even to hint at what the court thought of the merits of the case, should always be avoided at a trial of the issues before a jury.—*State v. Bartlett*, 440.

INSTRUCTION ON SELF-DEFENSE.

7. On a trial for assault with intent to kill, it appeared that ill feeling had existed between the complaining witness and defendant, and that defendant knew that complaining witness had threatened to take his life and went armed for that purpose; that defendant, having occasion to call on one who lived

beyond complaining witness' farm, selected a route which took him across complaining witness' farm, but which route persons living in that vicinity had used without objection, and that defendant carried with him a rifle. *Held* to warrant a charge that one cannot claim self-defense if he intentionally put himself where he knew he would have to invoke its aid, that if defendant could have avoided any conflict without increasing the danger to himself it was his duty to do so, and that if defendant sought the conflict, and the prosecuting witness showed fight and used a deadly weapon, or did an act in such a way as if about to engage in an affray, he could not invoke the law of self-defense until he had first retreated as far as he could with safety to himself.—*State v. Remington*, 99.

INSTRUCTION AS TO DEGREES—NEED OF REQUEST.

8. Where a charge necessarily includes several degrees of crime, an instruction that the jury may find the defendant guilty of the lesser degree if they have a reasonable doubt of his guilt of the higher degree, must be specially requested or it need not be given: *State v. Cody*, 18 Or. 506, overruled.—*State v. Reynier*, 224.

AIDING AND ABETTING.

9. An instruction, on a prosecution for an illegal sale of intoxicating liquors, that defendant would be guilty if he aided or assisted another in effecting the sale in violation of law, is not error: B. & O. Comp. § 2153, declaring one who aids and abets in the commission of a crime to be a principal.—*State v. Carmody*, 1.

ASSUMPTION OF FACTS.

10. The fact that the female was under the age of 21 years is not assumed by the instruction on a prosecution under Laws 1906, p. 327, making it an offense to permit a female under such age to remain in a saloon; that the question to be determined was whether defendants were the owners of a saloon, and whether they permitted P. (the female), who was, in fact, under the age of 21 years, to remain in their saloon.—*State v. Baker*, 381.

REQUESTED INSTRUCTIONS.

11. Requested instructions substantially covered by the general charge are properly refused.—*McGregor v. Oregon R. & N. Co.* 527.

Right of Way for Highways Over Public Lands. see HIGHWAYS, 5.

Not Error to Instruct Must Be Reasonable Width. See HIGHWAYS, 9.

In Criminal Prosecutions. See CRIMINAL LAW, 2, 3, 22.

On Illegal Sale of Intoxicating Liquors. See CRIMINAL LAW, 1.

As to Measure of Damages for Personal Injuries. See TRIAL, 1.

When One Cannot Claim Self-Defense. See HOMICIDE, 2.

"Sale or Gift" of Intoxicating Liquor by Club. See INTOXICATING LIQUORS, 4.

INSURANCE.

BURDEN OF PROOF AS TO SUICIDE.

1. The burden of proving suicide as a defense to a claim on a life insurance policy is on defendant under the rule that he who alleges must prove.—*Hildebrand v. United Artisans*, 159.

LOCAL OFFICERS AS AGENTS OF INSURER.

2. Where the by-laws of a mutual benefit society provide that on a member's death the officers of the local society to which he belongs shall furnish full proof of death on printed blanks prepared for that purpose and give their opinion of the validity of the beneficiary's claim, such local officers must be considered the agents of the general society.—*Hildebrand v. United Artisans*, 159.

PROOFS OF DEATH—QUESTION FOR JURY.

3. In an action on a mutual benefit certificate, evidence held to require submission to the jury of the question whether proof of death was submitted by plaintiff or was furnished by the secretary of the local order in accordance with its by-laws.—*Hildebrand v. United Artisans*, 159.

BENEFIT CERTIFICATE—ACTION—EVIDENCE.

4. Where the local secretary of a mutual benefit society, in accordance with its by-laws, sent proofs of insured's death to the supreme secretary, it was immaterial that she procured the services of an attorney, who was a member of the order, and who subsequently became the attorney for the beneficiary in an action on the certificate, to assist her in preparing such proofs.—*Hildebrand v. United Artisans*, 159.

INTOXICATING LIQUORS.

CRIMINAL PROSECUTIONS—ADMISSIBILITY OF EVIDENCE.

1. Under the local option law (Laws 1905, p. 47, § 10), providing that the order of the county court declaring the result of a local option election shall be held to be *prima facie* evidence that all the provisions of the law have been complied with in giving notice, etc., the order of the county court is admissible in a criminal prosecution for violating that law, without introducing the petition, notices, etc., but the burden is on the accused to overcome such *prima facie* proof.—*State v. Kline*, 426.

CRIMINAL PROSECUTIONS—SALE—INCORPORATED CLUB.

2. Under the local option law (Laws 1905, p. 48, § 15), forbidding under penalty any person in prohibition territory to sell, exchange, or give away, with intent to evade the provisions of the law, any intoxicating liquors whatsoever, where intoxicating liquors are purchased by an incorporated society, and sold or distributed to the members at approximate cost, the act constituted a sale.—*State v. Kline*, 426.

OFFENSES—SALES—STATUTORY PROVISIONS—EXCEPTIONS—SOCIAL CLUBS

3. The local option law, section 2 (Laws 1905, p. 42), provides that the inhibition of the sale of intoxicating liquors, when effectuated, shall not prohibit the sale of certain liquors for certain excepted purposes, but no reference is made therein to clubs. *Held*, that when the prohibition law became operative in a certain county, it *ex proprio vigore* inhibited all social clubs within the county from selling or giving to members thereof, intoxicating liquors with a purpose of evading the law.—*State v. Kline*, 426.

CRIMINAL PROSECUTIONS—INSTRUCTIONS.

4. In a prosecution for violation of the local option law, where B., a witness, testified that at about the time stated in the complaint, he went into a building formerly operated as a saloon, and there talked with one of the defendants; that at the time he obtained a half pint of brandy, for which he offered to pay, but that the accused told him that an assessment would subsequently be made for the expense of the Corvallis Social and Athletic Club; that he thereafter paid an assessment of 40 cents; that he had not in the meantime procured any other goods at that place; that the sum paid was more than the ordinary price of such liquor, and that he thought the assessment imposed upon him included his right to visit the clubrooms—it was not error to instruct, that if the club was the owner of, or kept intoxicating liquor, which was sold or given to B. for the purpose of evading the local option law, and that defendants, or either of them, aided or authorized such sale or gift with such intent, the averments in the complaint were sufficiently established, for the use of the expression "sale or gift" was proper to dispel any doubt as to the nature of the disposal of the liquor under the circumstances mentioned.—*State v. Kline*, 426.

EVIDENCE—INTERNAL REVENUE LICENSE—STATUTORY PROVISIONS—"PERSON."

5. The local option law, section 18 (Laws 1905, p. 50), provides that the issuing of a license or internal revenue special tax stamp by the Federal government to any person for the sale of intoxicating liquors shall be *prima facie* evidence that such person is selling, exchanging, or giving away intoxicating liquors. *Held*, that the term "person," as used, includes the word "corporation"; hence it was not error to instruct that if an internal revenue license had been issued to a certain club authorizing the sale of intoxicating liquor, such license was *prima facie* evidence that the club was engaged in selling, exchanging, or giving away intoxicating liquors, but that such finding alone would not be applicable to the defendants, or either of them.—*State v. Kline*, 426.

LOCAL OPTION—PRIMA FACIE EVIDENCE.

6. Under the Local Option Law (Laws 1905, p. 47, c. 2), § 10, providing that the order of the county court declaring the result of an election under the act and prohibiting the sale of intoxicating liquors within the prescribed territory "shall be held to be *prima facie* evidence that all the provisions of the law have been complied with in giving notice of and holding such election, and in counting and returning the votes and declaring the result thereof," such order is *prima facie* evidence of the legality of all previous proceedings in the matter of the election, so that it is unnecessary, on a prosecution for a sale in violation of the act, to allege or prove that a valid election was held, or that a majority of the voters was in favor of prohibition, otherwise than to allege and produce such order.—*State v. Carmody*, 1.

JUDICIAL NOTICE OF QUALITIES OF BEER.

7. A charge of unlawfully selling intoxicating liquor is sustained by proof of sale of "beer," without any further description or testimony as to its intoxicating qualities.—*State v. Carmody*, 1.

INDICTMENT—BEVERAGE.

8. Under the general rule that an indictment for a statutory misdemeanor is sufficient if it follows the words of the statute and is reasonably certain in its description of the offense intended to be charged, an indictment charging that defendant did "sell and give to one Q six bottles of intoxicating liquor with an intent and purpose of evading the local option law," etc., is not defective in failing to show that the liquor was intended as a beverage, since those are the words of the statute.—*State v. Carnody*, 1.

REGULATION—CITY CHARTER AND GENERAL LAW.

9. The charter of Portland authorizing such city to exercise, within its limits, police powers, to the same extent as the State has or could exercise such powers, and to regulate saloons and saloonkeepers, having no words of exclusion or restriction concerning the exercise of the power thus conferred, (Laws 1908, p. 32), does not repeal or affect the general laws on the same subject, or prevent a prosecution for a violation thereof within the city.—*State v. Baker*, 381.

SAME.

10. The clause of the charter of Portland, that no provision of the law concerning the sale or disposition of liquors in the county in which said city is situate, shall apply to said city, has no reference to legislation under the police powers regulating and controlling the places where, or the persons by whom, such liquors are sold.—*State v. Baker*, 381.

SALOONS.

11. A room used by saloonkeepers in connection with their saloon business is part of the saloon, within Laws 1905, p. 327, making it an offense for saloonkeepers to permit a female under the age of 21 years to remain in or about the saloon.—*State v. Baker*, 381.

WORDS AND PHRASES—SALOON.

12. A "saloon" is a building or place where liquors are kept for sale at retail, and may include more than one room.—*State v. Baker*, 381.

PERMITTING WOMEN ABOUT SALOONS.

13. Laws 1905, p. 327, making it an offense to permit a female under the age of 21 years to remain in or about a saloon, is not void as unreasonable, because making no distinction dependent on the purpose of the visit; but is a regulation clearly within the police power.—*State v. Baker*, 381.

EVIDENCE.

14. On a prosecution for permitting a female to remain in a saloon, in violation of Laws 1905, p. 327, evidence that while she was there, defendants sold her beer, is competent as an essential part of the transaction, and tending to show that they were engaged in selling intoxicating liquors, and that they permitted her to remain in the saloon.—*State v. Baker*, 381.

JOINDER.

Of Causes of Actions. See **PLEADING**, 23.

JOINT ADVENTURES.**ACCOUNTING.**

1. Plaintiff and defendant, W., who was a member of a firm of real estate brokers having an option to purchase a tract of land for \$5,000, contracted to buy the land on a basis of \$7,000, under an agreement providing that if plaintiff and defendant W., within 60 days after the payment of the earnest money, paid the balance of \$6,850, the owner's agent agreed to convey the land, etc. Held, that such agreement bound W. and plaintiff to pay the owner \$7,000 for the land, and hence the fact that W. thereafter avoided fulfilling his part of the obligation by exercising an option held by his firm did not create a liability on W.'s part to account to plaintiff for the amount saved.—*Scott v. White*, 111.

JUDGMENTS.**ENTRY NUNC PRO TUNC—RETROSPECTIVE EFFECT.**

1. Where, at the time confession of judgment was executed and entered by the clerk, no judgment was entered thereon, but it was entered on the judgment docket and execution was issued and sale had, and afterwards judgment was entered *nunc pro tunc* as of the date of the confession of judgment, the entry was retrospective, and had the same force as if made at the time when judgment was rendered, except as to third persons having intervening rights.—*Davidson v. Richardson*, 328.

EFFECT ON INTERVENING RIGHTS—INCIOATE DOWER RIGHT.

2. Although a *nunc pro tunc* entry of a judgment does not operate to create a lien from a date earlier than its actual entry to effect intervening rights of

third persons, the possessor of an inchoate right of dower in land of the judgment debtor at the time judgment was rendered, who has not changed her condition upon faith in the record, has no such interest as entitles her to protection.—*Davidson v. Richardson*, 323.

JUDGMENT AS AN ESTOPPEL.

3. A judgment for plaintiff, in an action of trespass, is only evidence that the title to some part of the premises was in the successful party, and, before he can avail himself of such judgment as an estoppel in another proceeding, he must show on what part of the premises the trespass was committed, and then apply the issue and judgment to the premises in controversy in the suit to enjoin.—*Hume v. Burns*, 121.

RES JUDICATA—ESTOPPEL.

4. An owner of land entered into a contract to sell the timber thereon, and the contract was thereafter assigned. The assignee and the owner entered into an agreement modifying such contract, so that the owner had the right to cut all timber under 12 inches in diameter. The contract thereafter, by successive assignments, came into the hands of a corporation, which brought an action against the owner for the removal of timber by him, and judgment went against him, from which he did not appeal. *Held*, in an action by the owner to restrain the unlawful cutting of timber under 12 inches in diameter by the corporation, that he could show that the contract had been modified in that regard, and that the judgment against him was not an estoppel to set up such modification, though he failed to allege the modification as a defense to that suit.—*Roots v. Boring Junction Lum. Co.* 293.

PUBLIC LAND—INTEREST OF ENTRYMAN—LIEN OF JUDGMENT AFTER ISSUANCE OF FINAL RECEIPT.

5. Where an entryman on government land completes the required residence on the tract, and makes his final payment, receiving a receipt therefor, he thereby acquires more than an equity, he has an inchoate legal title that is included within the meaning of the expression "real property," used in Section 205, B. & O. Comp., providing that a judgment properly docketed shall be a lien on the real property of the defendant in the county where such judgment is docketed.

Where one has made final proof and paid the purchase price of land applied for under the timber and stone act, and received the final receipt therefor, such land becomes "real property" of the purchaser and subject to the lien of a judgment docketed against him.—*Budd v. Gallier*, 42.

DOCKETING IMMEDIATELY—DIRECTORY STATUTE.

6. The provision in Section 205, B. & O. Comp., that the clerk shall enter a judgment in the proper docket "immediately" after it has been entered, is directory only, and a delay by the clerk in performing his duty does not affect the lien from the time when the judgment is docketed.—*Budd v. Gallier*, 42.

CASE UNDER CONSIDERATION.

7. The lien of a judgment on real property created by the filing of a transcript of a judgment from another county, under Section 205, B. & O. Comp., is not affected by the fact that the clerk's certificate to the transcript shows it to be a true copy of the original "judgment lien docket," though in the statute, Section 581, B. & O. Comp., such record is called a "judgment docket," where it appears from the entry of the transcript that the judgment was originally entered in a book in which the judgments and decrees of the court were regularly docketed, and which contained the proper rulings and headings provided by law for a judgment docket.—*Budd v. Gallier*, 42.

PRESUMPTION IN FAVOR OF.

8. Every presumption will be given to proceedings in a court of general jurisdiction necessary to support the validity of its judgments and decrees, when the court is proceeding according to the common law.—*Fishburn v. Londershausen*, 363.

PLEADING JUDGMENT—SERVICE BY PUBLICATION.

9. Section 53, B. & O. Comp., provides that, in case of service of process by publication, a copy of the summons shall be deposited in the postoffice, directed to the defendant at his last known postoffice address. *Held*, that where, in an action on a note purchased by plaintiff at a sale under execution, based on a judgment in an attachment suit against the owner of the note, the complaint alleged service by publication in the action against the owner of the note and his default, but failed to show that a copy of the summons was deposited in the postoffice directed to defendant at his last known postoffice address, and no reason was given for failure to meet such requirement, and it did not appear that due diligence had been used to ascertain defendant's whereabouts, the complaint was insufficient to show jurisdiction.—*Fishburn v. Londershausen*, 363.

COLLATERAL ATTACK—JURISDICTION—FOREIGN CORPORATIONS—SERVICE OF PROCESS—SUFFICIENCY.

10. Where the complaint, in a transitory action against a foreign corporation, alleged a cause of action for personal service rendered by plaintiff to defendant between June 23, 1903, and May 15, 1904, as manager and superintendent of its mines in Josephine County, at an agreed salary, and that the action was begun May 13, 1903, in Josephine County, it is a sufficient showing, as against a collateral attack, that the defendant was doing business in the State when the action was commenced.—*Brown v. Lewis*, 358.

COLLATERAL ATTACK—SERVICE OF SUMMONS.

11. Under section 55, B. & O. Comp., providing that in an action against a private corporation, summons shall be served by delivering a copy, etc., to the president or other head of the corporation, etc., or, in case none of the officers named shall reside or have an office in the county where the cause of action arose, then to any clerk who may reside or be found in the county; where a complaint shows that the corporation is doing business in the State, and that the action is upon a contract for service within the State, relating to that business, service of summons made upon its president in another county than where the action is pending is *prima facie* evidence that he represented the defendant company in the State, and the notice is sufficient *prima facie* to give the court jurisdiction, and, if the service is defective, it must be attacked in that proceeding and cannot be questioned collaterally.—*Brown v. Lewis*, 358.

COLLATERAL ATTACK—JURISDICTION—PRESUMPTION.

12. Jurisdiction of the person of a defendant is presumed in support of a judgment only when he is within the territorial limits of the court, and, if he is not within such limits, the records must show service on him; hence, where a return, indorsed on the summons of a foreign corporation, does not show that such corporation is doing business in the State or has an office therein, it is insufficient to show service on the corporation, and, unless aided by recitals in the decree, the defect will render the decree void as against the corporation.—*Knapp v. Wallace*, 348.

SAME.

13. Generally, if the record of a judgment is silent as to service, or, if in the absence of a return, there is a recital of due service in the judgment, then upon collateral attack jurisdiction will be conclusively presumed; but where the record contains the return of service, the recital must be considered as referring to such return.—*Knapp v. Wallace*, 348.

COLLATERAL ATTACK.

14. In view of Section 55, B. & O. Comp., a decree held void in collateral attack.—*Knapp v. Wallace*, 348.

Not a Lien on Equitable Interest in Real Property. See EXECUTION, 7.

JURISDICTION.

Waiver of by Not Objecting. See EQUITY, 3.

Of Foreign Corporation Doing Business in the State. See JUDGMENTS, 10.

JURY.

JURY—SELECTION—JUSTICES' COURTS.

2. Where a party, as authorized by Section 2257, B. & O. Comp., demands a jury selected from the jury list, provided for by Section 2261 *et seq.*, the court cannot, over the objections of such party, direct an officer to summon a jury as authorized by sections 2221 and 2222, though the court has no jury list.—*Cusiter v. City of Silverton*, 419.

JUSTICES OF THE PEACE.

JUSTICES OF THE PEACE—SUMMONS—CONTENTS.

1. Laws 1905, p. 315, provides that a justice's summons shall require the defendant to appear and answer within seven days from the date of service, or suffer judgment for the sum specified in the complaint with the disbursements of the action, and Section 2238, B. & O. Comp., provides that such summons shall be served by delivering a copy thereof, together with a certified copy of the complaint, etc. Held, that where a summons properly issued and signed contained sufficient information to warn defendant that a judicial proceeding was pending against him in a particular court, and that if he did not appear and answer, a judgment would be taken against him for a specified sum, it was not fatally defective for failure to state the rate of interest demanded and the date from which it was to be computed, such facts appearing from a copy of the complaint served with the summons.—*Stanley v. Rachofsky*, 472.

IRREGULARITY IN PROCESS—SERVICE—REMEDY.

2. An irregularity in the process or in the manner of its service by which a justice's jurisdiction was acquired must be taken advantage of by some motion or proceeding in the court where the action is pending.—*Stanley v. Rachofsky*, 472.

COPY OF SUMMONS—CERTIFICATION.

3. Where a return of service of a justice's summons certified that a copy was served, such return was sufficient proof that the instrument served was a copy under Section 2303, B. & O. Comp., requiring only that a copy of the summons be served, and not requiring that it be certified by any one to be a copy.—*Stanley v. Rachofsky*, 472.

TIME TO ANSWER.

4. Under Laws, 1906, p. 815, providing that a defendant in a justice's court shall be required to answer within seven days from the date of the service, he may answer on any one of those dates.—*Stanley v. Rachofsky*, 472.

APPEARANCE—DOCKET ENTRY.

5. Laws 1906, p. 815, requires defendant in a justice's court to answer within seven days from the date of service, and Section 2211, B. & O. Comp., provides that his plea or answer must be in writing and be filed with the justice. *Held*, that where a defendant in a justice's court could not have been in default until the date on which judgment was rendered, and was in default on the beginning of that day, and the judgment recited that defendant had failed to answer the complaint as required by law, such recital being in the form set forth on page 786, B. & O. Comp., was sufficient to sustain the judgment without a docket entry of defendant's failure to appear.—*Stanley v. Rachofsky*, 472.

APPEAL—RECORD—CONCLUSIVENESS—IMPEACHING BY AFFIDAVITS.

6. Where the record of a justice's court states that a reply was filed in that court before trial, and the reply is attached to the justice's transcript and returned as one of the original papers in the case, the record cannot be impeached by *ex parte* affidavits because the justice failed to endorse on the reply the date of its filing.—*Bade v. Hibbert*, 501.

JURY—SELECTION—JUSTICES' COURTS.

7. Where a party, as authorized by Section 2257, B. & O. Comp., demands a jury selected from the jury list, provided for by Section 2251 *et seq.*, the court cannot, over the objections of such party, direct an officer to summon a jury as authorized by sections 2221 and 2222, though the court has no jury list.—*Custler v. City of Silverton*, 419.

LANDLORD AND TENANT.

ASSIGNABILITY OF CROP LEASE.

1. A lease providing for the possession and cultivation of ground, and requiring services not possessed by agriculturists generally, is a personal contract and not assignable, except by consent, without working thereby a forfeiture of the lease.—*Myer v. Roberts*, 81.

RIGHT TO CROP AFTER RE-ENTRY.

2. A landlord who lawfully re-enters upon leased property is entitled to the crops that were growing at that date, as they pass with the possession.—*Myer v. Roberts*, 81.

RETAINING POSSESSION UNLAWFULLY.

3. A tenant who secures and maintains possession of land by an injunction wrongfully issued after the landlord had lawfully obtained possession for condition broken by such tenant, is not entitled to the crop harvested by him during the continuance of the restraint, on the theory that a landlord out of possession is not entitled to annual crops grown by an occupant and by him severed from the soil.—*Myer v. Roberts*, 81.

RECEIPT OF CROP AS RECOGNITION OF TENANCY.

4. The receipt by a landlord of part of a crop grown upon the leased land by the occupant thereof is not evidence of the relation of landlord and tenant, where the occupant's right to possession was consistently denied and the part of the crop tendered was received under a claim of title to the whole.—*Myer v. Roberts*, 81.

ADVANCES—ACTION—ISSUES.

5. Where the lessee of a hopyard under a lease, whereby the lessor was to have a certain portion of the crop, assigned his interest, on an issue between the assignee and the lessor as to the lessee's liability for advancements, any question as to whether another was a joint owner or partner with the lessee was immaterial.—*Chung v. Stephenson*, 244.

LARCENY.

FALSE PRETENSES—DISTINCTION.

1. Where possession of personal property is obtained from the owner by fraud, trick, or device, and the owner intends to part with both possession and the title when he surrenders control of the property, the offense is obtaining property by false pretenses; but if the possession is fraudulently secured, and the owner does not intend to part with the title, the offense is larceny.—*Beckwith v. Galice Mines Co.*, 542.

FACTS CONSTITUTING LARCENY FROM THE PERSON.

2. Where the defendant and the prosecuting witness agreed to exchange vests and the defendant received the garment from the witness, whereupon he suddenly and without the consent of the witness took therefrom articles of value, he is guilty of larceny from the person, prohibited by Section 1800, B. & O. Comp.—*State v. Reyner*, 224.

LARCENY FROM A STORE AND FROM THE PERSON—NATURE OF OFFENSE—ELEMENT OF VALUE OF PROPERTY.

3. The crimes of larceny from a store (Section 1790, B. & O. Comp.) and larceny from the person (section 1800) are compound larcenies, consisting of simple larceny (section 1790), aggravated by the circumstance of taking the property from a store or the person of another, in which the value of the property is not an ingredient of the offense, as in the case of simple larceny.—*State v. Reyner*, 224.

GREATER AND LESS DEGREES.

4. A charge of larceny from a store or from the person includes a charge of simple larceny, and under either of the former charges the defendant may be convicted of the last.—*State v. Reyner*, 224.

LAWS OF OREGON.

For Both Session Laws and Code Citations, see Table in Front of This Volume.

LEATHER STRAP.

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LIFE INSURANCE.

SUICIDE—Burden of Proof on Pleader. See INSURANCE, 1.

LIMITATION OF ACTIONS

FILING COMPLAINT—SERVICE.

1. Under Sections 6, 51, 14 and 15, B. & O. Comp. an action on a contract is barred where the complaint was filed and the summons delivered to the sheriff for service before the expiration of the statutory period, but no service was had or publication begun until more than sixty days thereafter.—*Dutro v. Ladd*, 120.

LOCAL OPTION.

Order of County Court Prohibiting Sale of Intoxicating Liquors Within Certain Territory. See INTOXICATING LIQUORS, 3.

"Sale or Gift" of Intoxicating Liquor by Club. See INTOXICATING LIQUORS, 4.

Local Option Law Not Unconstitutional. See CONSTITUTIONAL LAW, 11.

MAPS.

When Competent. See EVIDENCE, 16.

MALICIOUS PROSECUTION.

DUTY TO INSTRUCT AS TO PROBABLE CAUSE.

1. In actions for malicious prosecution, where the facts are admitted or established, it is the duty of the trial judge to declare their legal effect, and not to leave that matter to the untrained judgment of a jury.—*Putnam v. Stalker*, 210.

EFFECT OF PLAINTIFF HAVING BEEN HELD TO ANSWER BY COMMITTING MAGISTRATE.

2. The fact that the plaintiff in an action for malicious prosecution was examined before a committing magistrate, when witnesses were called for both sides, and was held to answer, establishes a *prima facie* case of probable cause for the arrest, subject to evidence that the action of the magistrate was induced by fraud or other improper influence.—*Putnam v. Stalker*, 210.

SUFFICIENCY OF EVIDENCE.

3. The evidence in this case clearly shows that defendant acted in good faith in making the charge complained of, and relied on the advice of the district attorney, to whom he had previously fully and fairly communicated all the facts within his knowledge.—*Putnam v. Stalker*, 210.

EFFECT OF ADVICE OF PROSECUTING ATTORNEY.

4. One who consults the district attorney before commencing a criminal prosecution and discloses to him all the facts which he knows or has reason to believe, and is advised to begin a prosecution, does not act without probable cause, even though by diligent search he might have discovered other and exculpatory facts, if he acted in good faith on the advice so received.—*Putnam v. Stalker*, 210.

MASTER AND SERVANT.

DUTY TO PROVIDE SAFE PLACE TO WORK.

1. Where it can be done at a reasonable expense, and without interfering with the conduct of the business, a master is under obligation to cover or protect dangerous machinery, under the general duty to provide a reasonably safe place for the employees to work.—*Westman v. Wind River Lum. Co.* 187.

ASSUMED RISK OF EMPLOYMENT.

2. Though a master is primarily bound to guard dangerous machinery in the exercise of ordinary care, the servant may dispense with the performance of such duty by consenting to work at a place which will expose him to danger, knowing and fully comprehending the risk incurred.—*Westman v. Wind River Lum. Co.* 187.

EVIDENCE IN REBUTTAL.

3. Where plaintiff, an oiler in defendant's mill, claimed to have been injured by the slipping of a plank in a platform constructed for his use, while it was defendant's theory that plaintiff was not performing his duties at the time he was injured, but was handling a loose conveyor belt, which had been removed from its pulley, and that it became entangled in the shaft while plaintiff was holding it, thereby causing the injury, plaintiff could prove in rebuttal that such conveyor belt was frayed at the edges, in order to warrant an inference that the belt was likely to get caught and wound around the shaft without human aid.—*Westman v. Wind River Lum. Co.* 187.

INJURY TO YOUTHFUL EMPLOYEE—DUTY OF WARNING.

4. It is the duty of an employer to warn a new employee who is to work around dangerous machinery of the dangers to be guarded against, unless they are obvious and appreciable to one of his age and experience.

Where plaintiff, a lad between 15 and 16 years old, had been employed as an oiler in defendant's sawmill shortly before his injury and was without experience in such work, defendant was bound to warn him of the danger incident to his employment and the risks attending it, unless such danger was open and apparent to one of plaintiff's age, experience and capacity, in the exercise of ordinary care and prudence.—*Westman v. Wind River Lum. Co.* 187.

ASSUMED RISK—QUESTION FOR JURY.

5. In an action for injuries to an inexperienced servant while performing his duty about dangerous machinery, the question whether the dangers of his employment were so open and obvious that he assumed the risk thereof was for the jury.—*Westman v. Wind River Lum. Co.* 187.

INJURY TO SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY.

6. Whether defendants exercised reasonable care in providing a safe fastening for a lever, by the displacement of which a servant was injured, *held*, under the evidence, to be a question for the jury.—*Trickey v. Clark*, 516.

CONCURRING NEGLIGENCE OF MASTER AND FELLOW SERVANT.

7. A master is liable for injuries to a servant caused by the concurring negligence of the master and a fellow servant, which would not have happened, but for the master's negligence.—*Trickey v. Clark*, 516.

INJURY TO SERVANT—PROXIMATE CAUSE—QUESTION FOR JURY.

8. Whether the knocking loose of a carriage fastener by a fellow employee falling against it, resulting in plaintiff's son being injured, was a natural consequence to be anticipated from defendant's failure to provide a safe and suitable fastener, *held*, under the evidence, a question for the jury.—*Trickey v. Clark*, 516.

MENTAL CAPACITY.

Evidence of Capacity of Grantor. See DEEDS, 2.

MONEY RECEIVED.**MISTAKE OF FACT.**

1. Payment of an illegal demand made under a mistake of fact may be recovered in an action for money had and received.—*Thorsen v. Hooper*, 497.

MORTGAGES.**ABSOLUTE DEED—EVIDENCE.**

1. In a suit to have a deed declared a mortgage, and for permission to redeem, on the claim that plaintiff transferred his interest in the contract for the deed to defendant only to secure a loan, evidence examined, and held sufficient to sustain the finding, that the transfer was intended as an absolute sale of plaintiff's interest in the contract.—*Cooper v. Strauber*, 556.

MUNICIPAL CHARTERS. Same as CHARTER OF CITIES.**MUNICIPAL CORPORATIONS.****MUNICIPAL CORPORATIONS—ASSESSMENT OF TAXES.**

1. Where, under a city charter, taxes on property within the city, for road purposes within the city, should have been levied by the city, but the same were levied by the county, and the county collected them, as required by Section 3004, B. & C. Comp., and the taxes were voluntarily paid, the city was entitled to recover them from the county.—*Eugene v. Lane County*, 468.

MUNICIPAL TAXATION.

2. Under Section 3004, B. & C. Comp., where a county tax collector collects a void municipal tax and turns it over to the municipality, the remedy of the taxpayer (if he has saved his rights), is against the municipality, and not against the county; hence the county having collected a void city tax, voluntarily paid by the taxpayer, is not justified in refusing to pay it over.—*Eugene v. Lane County*, 468.

3. A statute authorizing a municipality to assess the expenses of street improvements on property benefited thereby, does not violate the constitutional provision that taxation shall be equal and uniform.—*St. Benedict's Abbey v. Marion County*, 411.

MUNICIPALITY—CHANGING COUNTY ROADS TO STREETS.

4. When a city proceeds to act under a charter authorizing it to open, work and control all highways and roads within the corporate limits, and excepting that territory from the jurisdiction of the county court, and expressly vesting in the city control of the roads within its boundaries, it thereby accepts the relinquishment of the county court over such roads and the latter thereby become city streets and are thereafter subject to the burdens of streets; *Heiple v. East Portland*, 18 Or. 97, distinguished.—*Oliver v. Newberg*, 92.

LEGISLATIVE INTENTION.

5. Whether a county road becomes a street when included within a city's corporate limits depends upon the intention of the legislature, as gathered from the city charter, general laws and the whole course of legislation on the subject.—*Oliver v. Newberg*, 92.

VALIDITY OF STREET ASSESSMENT.

6. Under the provisions of the charter of Newberg the scheme for assessing the cost of street improvements is a pro rata one on all the lots involved according to frontage.—*Oliver v. Newberg*, 92.

MUTUAL BENEFIT INSURANCE

Local Officers as Agents of Society. See INSURANCE, 2.

NAVIGABLE WATERS.**DIVISION OF ADJOINING FRONTAGE.**

1. A proper division of water frontage along a navigable stream requires that each owner shall have a proportionate share, and the various rules adopted by different courts have that purpose.

Where the shore line is substantially straight and a government pier line has been established in a wide river subject to high tides and having a deep channel for ocean vessels, it will be equitable to divide adjoining frontages by the line from a common line at the shore perpendicular to such pier line.—*Columbia Land Co. v. Van Dusen Invest. Co.*, 59.

NEGLIGENCE.**CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.**

1. Contributory negligence is a matter of defense and the burden of establishing it is on defendant, unless plaintiff's declaration or evidence establishes it.—*Jackson v. Sumpter Valley Ry. Co.* 455.

CONTRIBUTORY NEGLIGENCE—ORDINARY CARE.

2. One is not guilty of contributory negligence, unless he fails to exercise ordinary care; and there is no want of ordinary care when, under the circumstances, he does not omit anything which an ordinarily prudent person similarly situated would not have omitted.—*Jackson v. Sumpter Valley Ry. Co.* 455

QUESTION FOR JURY—NEGLIGENCE.

3. Where both the duty to exercise care and the extent of its performance are to be ascertained as facts, the jury alone can determine what is negligence and whether it has been proven.—*Jackson v. Sumpter Valley Ry. Co.* 455.

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY.

4. Whether defendants exercised reasonable care in providing a safe fastening for a lever, by the displacement of which a servant was injured, *held*, under the evidence, to be a question for the jury.—*Trickey v. Clark*, 516.

CONCURRING NEGLIGENCE OF MASTER AND FELLOW SERVANT.

5. A master is liable for injury to a servant caused by the concurring negligence of the master and a fellow servant, which would not have happened, but for the master's negligence.—*Trickey v. Clark*, 516.

INJURY TO SERVANT—PROXIMATE CAUSE—QUESTION FOR JURY.

6. Whether the knocking loose of a carriage fastener by a fellow employee falling against it, resulting in plaintiff's son being injured, was a natural consequence to be anticipated from defendant's failure to provide a safe and suitable fastener, *held*, under the evidence, a question for the jury.—*Trickey v. Clark*, 516.

INJURY TO YOUTHFUL EMPLOYEE—DUTY OF WARNING.

7. It is the duty of an employer to warn a new employee who is to work around dangerous machinery of the dangers to be guarded against, unless they are obvious and appreciable to one of his age and experience.

Where plaintiff, a lad between 15 and 16 years old, had been employed as an oiler in defendant's sawmill shortly before his injury and was without experience in such work, defendant was bound to warn him of the danger incident to his employment and the risks attending it, unless such danger was open and apparent to one of plaintiff's age, experience and capacity, in the exercise of ordinary care and prudence.—*Westman v. Wind River Lum. Co.* 187.

INJURY TO PEDESTRIAN AT CROSSING—CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.

8. A person about to cross a street at a crossing is not bound to wait because a car is in sight; but if the car is at such a distance that he has time to cross, if it is run at the usual speed, it is not negligence, as a matter of law, to attempt to do so.—*Wolf v. City Railway Co.* 64.

NEGOTIABLE INSTRUMENTS. Same as BILLS AND NOTES.

NONRESIDENT.

Venue in Transitory Actions Against. See **VENUE**, 3.

NONSUIT.

Certain Facts Assumed to be True. See **TRIAL**, 12.

Taking Advantage of Defect in Pleadings by Motion. See **TRIAL**, 8.

Facts Sufficient to Justify a Nonsuit. See **TRIAL**, 9.

NOTES. Same as BILLS AND NOTES.

NOTICE.

VENDOR AND PURCHASER—NOTICE.

1. Whatever is sufficient to put a subsequent purchaser on inquiry must be considered legal notice to him of the facts inquiry would have disclosed by the exercise of reasonable diligence.—*Jennings v. Leutz*, 183.

ATTACHING CREDITORS—NOTICE—RECORDS.

2. Sections 300-335, 529, B. & C. Comp., provide that nonexempt real estate shall be liable to attachment by the sheriff making a certificate and filing the same with the clerk of the county in which the property is situated, and that from the date thereof the plaintiff, as against third persons, shall be a purchaser in good faith, and that every conveyance of real property within the State which shall not be recorded within five days after its execution shall be void as against a subsequent *bona fide* purchaser whose conveyance shall be first recorded. 1. Having sold certain land to D. for a consideration, half of which was secured by a mortgage thereon, B. within an hour conveyed the

property to G., who conveyed it to complainants' grantors. The mortgage to L. was recorded, but the deed to D. was not, and defendant, relying on a statement by L. that he had conveyed the land to D., attached it for D.'s debt, after which the deeds to D. and complainants were recorded. *Held*, that L.'s statement that he had conveyed the land to D. was rebutted by the record which showed that the title still remained in L., which record only gave notice of the facts therein stated and warned defendant to make further inquiries as to D.'s title to the premises, so that he was not a *bona fide* purchaser under his attachment, entitled to priority against complainants.—*Jennings v. Lentz*, 483.

NUNO PRO TUNC—

For Order Amending Bill of Exceptions. See BILL OF EXCEPTIONS, 1.

OREGON CASES, Applied, Approved, Cited, Distinguished, and Followed in This Volume. See Table in Front of This Volume.

OREGON CONSTITUTION. See Table in Front of This Volume.

OREGON STATUTES Cited in This Volume. See Table in Front of This Volume.

PAROL EVIDENCE.

When Not Admissible to Show Real Party Intended as Indorsee. See BILLS AND NOTES, 3.

PARTITION.

POSSESSION—TENANTS IN COMMON—BURDEN OF PROOF.

1. The burden is on plaintiff in partition, unless the suit is by one or more tenants in common of a vested remainder or reversion, to allege and prove, if denied, that he and defendant were in possession as tenants in common at the time of the commencement of the suit.—*Frye v. Moffet*, 495.

DISPUTE AS TO TITLE AND RIGHT OF POSSESSION.

2. A wife after divorce, *held* not entitled to maintain partition for property acquired during the marriage, until a dispute as to the title had been determined, and she acquired possession.—*Frye v. Moffet*, 495.

PAYMENT.

VOLUNTARY PAYMENT—RECOVERY.

1. One who voluntarily pays money in satisfaction of an asserted demand, with full knowledge of all the facts, cannot recover it, when the transaction is unaffected by any fraud, trust, confidence, or the like, because at the time of the payment he was ignorant of his legal rights.—*Thorsen v. Hooper*, 497.

MISTAKE OF FACT.

2. Payment of an illegal demand made under a mistake of fact may be recovered in an action for money had and received.—*Thorsen v. Hooper*, 497.

PAYMENT MADE ON MISTAKE OF FACT, IS RECOVERABLE.

3. An administrator having been garnished in a suit in which the attorney for the estate represented the creditor, judgment was recovered in favor of the creditor, on which an execution was placed in the hands of the sheriff for service, who notified the administrator that he had an order from the circuit court directing him to pay out of the funds of the estate the amount of the judgment and costs. The administrator thereupon advised with the attorney of the estate without knowledge that he was also representing the creditor in the garnishment proceedings, and was advised that the proceedings were regular, and that he was compelled to pay the money to the sheriff as demanded, which he thereupon did. *Held*, that the circuit court never having made an order in the garnishment proceedings requiring the administrator to pay the amount of the judgment out of the funds of the estate, the payment was made on mistake of fact, and was recoverable.—*Thorsen v. Hooper*, 497.

PERSONAL INJURIES.

See DAMAGES, 1, 2, 3: MASTER AND SERVANT.

PHRASES. Same as WORDS AND PHRASES.

PLATS.

Sale of Lots with Reference to. See DEDICATION, 2.

PLEADING.

COMPLAINT—OBJECTION ON TRIAL—PRESUMPTION.

1. Where an objection to the sufficiency of the complaint is made for the first time on the trial by objecting to the reception of any evidence thereunder, the same presumption will be indulged in to support the pleading as if the objection had been made after verdict, and unless the complaint is so defective that it would not be good after verdict, the objection will be overruled.—*Bade v. Hibberd*, 501.

INSUFFICIENT DESCRIPTION OF INSTRUMENT SUED ON—CURE BY VERDICT.

2. An insufficient description of contracts on which suit is brought, is merely a defective statement of the cause of action, which would be cured by verdict.—*Bade v. Hibberd*, 501.

SEPARATE CAUSES OF ACTION—SEPARATE STATEMENT—OBJECTION WHEN TO BE TAKEN.

3. The objection that separate causes of action are not separately stated cannot be raised during the admission of testimony, but should be taken by motion to strike out under Section 106, B. & C. Comp., providing that when a pleading contains more than one cause of action, if they be not pleaded separately, the pleading may be stricken out on motion of the adverse party.—*Bade v. Hibberd*, 501.

APPEAL—REVIEW—PRESUMPTION—PLEADINGS.

4. Where a complaint is indefinite as to the character of a contract sued on, but contains averments which seem to imply that it was an express contract, and no objection is made to the complaint until the trial, on appeal the action will be construed as on an express contract.—*Bade v. Hibberd*, 501.

COMPLAINT—DEFECTS—AIDED BY VERDICT.

5. Though an allegation in a complaint for replevin that defendant wrongfully took the property is defective in not disclosing that it was taken from plaintiff, where the proof discloses that it was wrongfully taken from plaintiff's possession, the defective allegation is aided by verdict so as to support a judgment for plaintiff, and defendant is not entitled to a direction of a verdict.—*Brown v. Lewis*, 355.

OBJECTIONS—WAIVER.

6. Where a reply treated claims set up by defendant as counterclaims, and they were so regarded on the trial, though they were defectively pleaded, they should have been treated as issues, and findings made thereon.—*Chung v. Stephenson*, 244.

DEPARTURE.

7. In a suit under Section 516, B. & C. Comp., to determine an adverse claim to real estate, a reply setting up adverse possession was no departure from the complaint, wherein it was alleged that plaintiff was the owner and in possession of the property, and that defendant claimed an adverse interest.—*Cooper v. Blair*, 394.

RIGHT TO CLAIM INCONSISTENT DEFENSES.

8. Under Section 73, B. & C. Comp., providing that an answer may contain any new matter constituting a defense, and section 74, that defendant may plead as many defenses as he has, defendants sued on an account for legal services, having pleaded a general denial, were entitled also to plead limitations as an affirmative defense.—*Dutro v. Ladd*, 120.

DEMURRER—CONSTRUCTION OF PLEADING.

9. A complaint, when tested by a demurrer, must be construed most strongly against plaintiff.—*Fishburn v. Londershausen*, 368.

DEFECTS.

10. A party relying on a technical defect in a pleading is subjected to observation of technical rules.—*Jackson v. Sumpter Valley Ry. Co.*, 455.

AMENDMENT—DISCRETION OF COURT.

11. The allowance of amendments to pleadings is largely within the discretion of the trial court.—*Pacific Mill Co. v. Inman*, 22.

AMENDMENTS—SUFFICIENCY OF NOT A TEST FOR FILING.

12. The right to file an amended pleading does not depend on whether it is good as against a demurrer or a motion to strike, for if it sets up a new defense or cause of action, or a former one more completely, or remedies any other defects, it is sufficient, and the amendment on being allowed is subject to the same tests as an original pleading.—*Pacific Mill Co. v. Inman*, 22.

TESTING PLEADINGS BY AFFIDAVIT.

13. Under Section 76, B. & C. Comp., providing that sham answers may be stricken on motion, etc., the court will not determine on affidavits whether a pleading is sham, where it is verified.—*Pacific Mill Co. v. Inman*, 22.

MOTION FOR JUDGMENT.

14. Where a material issue is tendered by a denial of the allegations of the complaint, a motion for judgment in favor of plaintiff is properly denied.—*Parfitt Mill Co. v. Inman*, 22.

AMENDING COMPLAINT—DISCRETION.

15. Under Section 102, B. & C. Comp., providing for amendments to pleadings, where the complaint in an action for injuries sustained on a bridge said to have been defective, showed that the plaintiff had not been informed of the condition of the structure, but did not show that he was ignorant of its condition, discretion was well exercised in allowing an amendment accordingly, where it did not appear that defendant was misled or injured.—*Ridings v. Marion County*, 30.

EFFECT OF OBJECTION UNDER ORIGINAL COMPLAINT.

16. The fact that under the original complaint objection was made to the admission of testimony as to plaintiff's lack of knowledge of the defect in the bridge does not deprive the court of power to allow the amendment: *Mendenhall v. Harrisburg Water Co.* 27 Or. 38, distinguished and explained.—*Ridings v. Marion County* 30.

REPLY—DEPARTURE.

17. Where a complaint alleges the unlawful cutting of timber, and the answer justified its cutting by pleading two contracts, setting them out in legal effect, it is not a departure from the cause of action in the complaint to set out the contracts in full in the reply.—*Roots v. Horing Junction Lum. Co.* 298.

ISSUES, PROOF, AND VARIANCE.

18. Where a complaint, in a suit to restrain the cutting of timber, is framed on the theory of restraining a trespass of land, and the plaintiff's evidence showed, not an unlawful trespass, but a rightful entry and the commission of waste, a motion to dismiss the complaint was properly denied, since the relief sought was substantially the same.—*Roots v. Horing Junction Lum. Co.* 298.

AMENDING PLEADINGS—EFFECT OF ERROR OF DISCRETION.

19. The granting of leave to amend a pleading is discretionary, and the order is valid and binding though erroneously granted.—*Sears v. Dunbar*, 36.

DUPPLICITY.

20. A count of a complaint in an action for fraud alleged that one of the defendants, a state land agent, with intent to defraud plaintiff, falsely represented himself to be in possession of private records and information as to mineral lands for which the State was entitled to indemnity selections, which information he offered to sell to plaintiff, and pretended that for a certain sum he would furnish to the other land agent for plaintiff's information as to the whereabouts of certain available mineral base land for which indemnity lands were due the State, and which would be approved by the Land Department and Secretary of the Interior, all of which was done with knowledge of its falsity, and that he thereby fraudulently obtained plaintiff's money. *Held*, that, though the terms of a contract are set up as constituting part of the means by which the fraud was consummated, the count was not duplicitous, since recovery was sought only upon the fraud and deceit, while to render a pleading duplicitous it must appear that two or more causes of action are relied upon for a single recovery.—*Summers v. Geer*, 249.

PLEA IN BAR.

21. Where matter concludes in bar, it must be so treated, and its character must be determined not from the subject-matter of the plea, but from its conclusions or prayer.—*Sutherland v. Bloomer*, 398.

WAIVER OF PLEA.

22. By not pleading a contract in abatement, defendant waived any right to rely upon it for that purpose, and may not insist that under the contract the decree against him was premature.—*Sutherland v. Bloomer*, 398.

ANSWER—INSUFFICIENCY—FAILURE TO DEMUR.

23. The insufficiency of an answer may be urged in opposition to defendant's motion for judgment on the pleading in the lower court, or on appeal, though no demurrer was filed thereto.—*Sutherland v. Bloomer*, 398.

JOINDER OF CAUSES ARISING UNDER CONTRACT.

24. Under the express provisions of Section 94, B. & C. Comp. more than one cause of action arising out of contract may be united in the same complaint, but must be separately stated.—*Baile v. Hibberd*, 501.

DEFENSES—LOSS OF GOODS.

25. A defense by a carrier that part of the goods sued for did not belong to plaintiff, could not be proved where not specially pleaded.—*McGregor v. Oregon R. & N. Co.*, 527.

Cause of Action for Fraud. See FRAUD, 1.

Defective Complaint to Recover Triple Damages. See TRESPASS, 1.

Amended Reply. See APPEAL AND ERROR, 17.

Judgment on Service by Publication. See JUDGMENT, 9.

PRESCRIPTION. See ADVERSE POSSESSION.

PRESUMPTION.

There was Testimony Introduced Sufficient to Support the Verdict. See EVIDENCE, 5.

That the Record was a True Statement of the Case. See APPEAL, 18.

That Purchase was Intended as an Advancement. See TRUSTS, 3.

Service on President of Foreign Corporation. See CORPORATIONS, 2.

As to a Court of General Jurisdiction. See JUDGMENT, 8.

Same to Support Complaint as if Made After Verdict. See PLEADING, 1.

Where Complaint is Indefinite, When Action Will be Construed as on an Express Contract. See PLEADING, 4.

That the Court Prepared the Bill of Exceptions. See BILL OF EXCEPTIONS, 2.

PRINCIPAL AND AGENT.

EFFECT OF PROOF OF DEATH FURNISHED BY OFFICERS.

1. The statements of the officers of a local lodge of a benefit society against the interest of the general society are competent in an action on the benefit certificate.—*Hildebrand v. United Artisans*, 59.

PROCESS.

FOREIGN CORPORATIONS—ACTIONS—JURISDICTION.

1. Before service of process on the president of a foreign corporation will confer jurisdiction, it must be made to appear that the corporation is doing business in the State, or is otherwise within its jurisdiction; but if the company is doing business in the State, or has an office therein in connection with its business, then the presence of an officer in connection therewith is the presence of the corporation.—*Knapp v. Wallace*, 348.

SERVICE ON FOREIGN CORPORATIONS—PRESUMPTIONS.

2. So long as a corporation confines its operations to the State within which it was created, and it has no office or transacts no business in this State, no presumption can arise that service on the president of the corporation within this State is service on the corporation.—*Knapp v. Wallace*, 348.

SERVICE—AMENDMENT BY EX-SHERIFF OF SERVICE BY DEPUTY.

2. An ex-sheriff cannot amend a return of a service made by his deputy during his term of office.—*Knapp v. Wallace*, 348.

SUBSTITUTED SERVICE—TIME OF MAILING.

4. An affidavit for an order of service by publication stated defendant's postoffice address. The order required mailing accordingly. The summons required defendant to appear and answer "on or before the last day of the time prescribed in the order for the publication." The order for publication was dated May 16, 1904. The first publication was June 25, 1904, and the last August 6, 1904. The affidavit of mailing was made on January 4, and filed January 9, 1905, and stated that the copies of summons and complaint were mailed August 6, 1904. *Held*, that the mailing was not a compliance with the order of the court or the statute, and was insufficient to give the court jurisdiction.—*Knapp v. Wallace*, 348.

AMENDMENT OF RETURN AFTER DECREE—LEAVE OF COURT.

5. Where plaintiff, four months after the entry of the decree, filed, as an amended return, an affidavit of the person making the original affidavit to the effect that the mailing was done on June 25, 1904, but it did not appear that leave of court was obtained to amend the return, nor that there was any showing made by affidavit on which to base the order, the amendment is ineffectual to aid the jurisdiction of the court.—*Knapp v. Wallace*, 348.

FOREIGN CORPORATIONS—SERVICE ON FOREIGN CORPORATIONS—VALIDITY OF SERVICE—STATUTORY PROVISIONS—JURISDICTION.

6. Section 55, B. & C. Comp., provides that in an action against a private corporation, summons shall be served by delivering a copy thereof, etc., to the president, etc., or in case none of the officers named shall reside or have an office in the county where the cause of action arose, then to any clerk, etc., who may reside or be found in the county, and if no such officer be found, then by leaving a copy at the residence, etc., of such clerk or agent. A complaint showed that defendant was a foreign corporation owning property in Josephine County in this State, and the return of service merely showed personal service on the president of the corporation in Multnomah County, without showing that it was made in the county where defendant corporation had its principal office or place of business, or that it was doing business in the State; and those facts did not appear in the record, though the decree recited an examination of the return made in the case, "wherefore, it is thereby and otherwise made to appear to the satisfaction of the court that the defendant corporation has been duly served with summons within the State." *Held*, that the record disclosed that there was no service on the corporation, and that the court acquired no jurisdiction over it; the decree in such a case will be held void on a collateral attack.—*Knapp v. Wallace*, 348.

ACTIONS AGAINST FOREIGN CORPORATIONS—JURISDICTION—SUFFICIENCY OF AFFIDAVIT FOR PUBLICATION.

7. Where an affidavit for publication shows that defendant, a foreign corporation, with its principal office and place of business in California, had theretofore been engaged in mining in Josephine County, but had ceased operations there, and had no officer or agent therein on whom service could be made, but that its officers reside and are in California, it is sufficient to show that service could not be made in this State, in view of Section 55, B. & C. Comp., providing that in actions against a private corporation summons shall be served by delivering a copy to the president or other head of the corporation, etc., or managing auditor, or in case none of the officers of the corporation above named shall reside or have an office in the county where the cause of action arose, then to any clerk, etc., who may reside or be found in the county, or, if no such officer be found, by leaving a copy, etc.—*Knapp v. Wallace*, 348.

SUMMONS—CONTENTS.

8. Laws 1906, p. 315, provides that a justice's summons shall require the defendant to appear and answer within seven days from the date of service, or suffer judgment for the sum specified in the complaint with the disbursements of the action, and Section 238, B. & C. Comp., provides that such summons shall be served by delivering a copy thereof, together with a certified copy of the complaint, etc. *Held*, that where a summons properly issued and signed contained sufficient information to warn defendant that a judicial proceeding was pending against him in a particular court, and that if he did not appear and answer, a judgment would be taken against him for a specified sum, it was not fatally defective for failure to state the rate of interest demanded and the date from which it was to be computed, such facts appearing from a copy of the complaint served with the summons.—*Stanley v. Rachofsky*, 472.

IRREGULARITY IN PROCESS—SERVICE—REMEDY.

9. An irregularity in the process or in the manner of its service by which a justice's jurisdiction was acquired must be taken advantage of by some motion or proceeding in the court where the action is pending.—*Stanley v. Rachofsky*, 472.

COPY OF SUMMONS—CERTIFICATION.

10. Where a return of service of a justice's summons certified that a copy was served, such return was sufficient proof that the instrument served was a copy under Section 238, B. & C. Comp., requiring only that a copy of the summons be served, and not requiring that it be certified by any one to be a copy.—*Stanley v. Rachofsky*, 472.

SERVICE BY PUBLICATION.

11. Section 55, B. & C. Comp., provides that, in case of service of process by publication, a copy of the summons shall be deposited in the postoffice, directed to the defendant at his last known postoffice address. *Held*, that where, in an action on a note purchased by plaintiff at a sale under execution, based on a judgment in an attachment suit against the owner of the note, the complaint alleged service by publication in the action against the owner of the note and his default, but failed to show that a copy of the summons was deposited in the postoffice directed to defendant at his last known postoffice address, and no reason was given for failure to meet such requirement, and it did not appear that due diligence had been used to ascertain defendant's whereabouts, the complaint was insufficient to show jurisdiction.—*Fishburn v. Londershausen*, 383.

COLLATERAL ATTACK—SERVICE OF SUMMONS.

12. Under section 55, B. & C. Comp., providing that in an action against a private corporation, summons shall be served by delivering a copy, etc., to the president or other head of the corporation, etc., or, in case none of the officers named shall reside or have an office in the county where the cause of action arose, then to any clerk who may reside or be found in the county; where a complaint shows that the corporation is doing business in the State, and that the action is upon a contract for service within the State, relating to that business, service of summons made upon its president in another county than where the action is pending is *prima facie* evidence that he represented the defendant company in the State, and the notice is sufficient *prima facie* to give the court jurisdiction, and, if the service is defective, it must be attacked in that proceeding and cannot be questioned collaterally.—*Brown v. Lewis*, 358.

Effect of Filing Complaint Without Service. See LIM. OF ACTIONS.

PROPERTY.

An "Exchange" Distinguished from a "Sale" See SALES, 1.

PUBLIC IMPROVEMENTS.

Assessments For Highway Improvements. See CONSTITUTIONAL LAW, 5, HIGHWAYS, 1, 2, 3, 4.

PUBLIC LANDS.

DISPOSAL—OFFICES OF COMMISSIONER AND AGENT.

1. The Governor was made land commissioner in 1878, by Hill's Ann. Laws 1892, section 8595, with power to locate all lands to which the State was entitled. Subsequently, by Act February 18, 1899 (Laws 1899, p. 156), which repealed section 8597 and its amendments of 1895 (Laws 1895, p. 7) and 1899 (Laws 1899, p. 94), providing for an agent's appointment and fixing his duties, the Governor was made land commissioner, with authority to appoint such agents as might be necessary in the performance of his duties, the agents thus having no specified duties other than to aid the commissioner in locating the lands. *Held*, that the commissioner and agents were not agents of the State for the sale of state lands, and, in an action against them for defrauding a person desiring to buy state lands, allegations that they neglected to prepare and keep for public use a list of base land, and that they refused to receive applications for the purchase of indemnity land, etc., are immaterial, since those matters were not within their duties.—*Summers v. Geer*, 249.

AUTHORITY TO SELL LAND—SELLING LIEU LAND NOT YET SELECTED.

2. Hill's Ann. Laws 1892, section 8597, as amended in 1895 (Laws 1895, p. 7), makes it a duty of the State Land Board to proceed immediately to select lieu lands and perfect title thereto in the State, and keep a list of such as are for sale, etc. Section 3235, B. & C. Comp. (amendment of 1899), provides that applications to purchase state lands can be made only to the State Land Board by filing the application with its clerk. Hill's Ann. Laws 1892, section 3619, authorizing a prospective purchaser to ascertain lands lost to the State, and have the land board select other lands desired by him in lieu thereof, was repealed in 1895, since which time the law has not contemplated sales of indemnity lands or applications for their purchase until they have been selected and title perfected in the State. *Held*, that the land agent or board has no authority to make contracts for the State to sell lieu land not yet selected and to which title has not been perfected, and, if it were optional with the state land agent or board to select such lieu land as a prospective purchaser suggests, upon base to be established by the purchaser, board or agent, the approval by the United States Land Department of the selection would be at the applicant's risk.—*Summers v. Geer*, 249.

DEDICATION—HIGHWAYS—PUBLIC LANDS—ACT OF CONGRESS CONSTRUED.

3. Section 2477, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1567], granting a right of way for highways over public lands not reserved for public uses, is an express dedication of a right of way, and an acceptance of the grant while the land is a part of the public domain may be effected by public user alone, without any action of the public highway authorities, and, when an acceptance thereof has once been made, the highway is legally established, and is thereafter a public easement upon the land, and subsequent entrymen and claimants take subject to such easement.—*Montgomery v. Somers*, 259.

INTEREST OF ENTRYMAN—LIEN OF JUDGMENT AFTER ISSUANCE OF FINAL RECEIPT.

4. Where an entryman on government land completes the required residence on the tract, and makes his final payment, receiving a receipt therefor, he thereby acquires more than an equity, he has an inchoate legal title that is included within the meaning of the expression "real property," used in

Section 205, B. & O. Comp., providing that a judgment properly docketed shall be a lien on the real property of the defendant in the county where such judgment is docketed.

Where one has made final proof and paid the purchase price of land applied for under the timber and stone act, and received the final receipt therefor, such land becomes "real property" of the purchaser and subject to the lien of a judgment docketed against him.—*Budd v. Gallier*, 42.

QUIETING TITLE.

PLEADING—DEPARTURE.

1. In a suit under Section 516, B. & O. Comp., to determine an adverse claim to real estate, a reply setting up adverse possession, was no departure from the complaint, wherein it was alleged that plaintiff was the owner and in possession of the property, and that defendant claimed an adverse interest.—*Cooper v. Blair*, 394.

ADMISSIBILITY OF EVIDENCE.

2. In a suit to determine an adverse claim to real estate, wherein plaintiff claimed title by adverse possession, evidence by defendant to establish her ownership by common reputation, referring principally to discussion among her neighbors, is inadmissible.—*Cooper v. Blair*, 394.

RAILROADS.

INJURY TO ANIMALS—CONTRIBUTORY NEGLIGENCE—PLEADINGS.

1. Where, in an action against a railroad company for killing cows on its track, the company as an affirmative defense alleged that plaintiff negligently herded cows along the right of way within switching limits at a station, with knowledge that the right of way was dangerous, a reply denying the averments of the answer, except that "certain cows of the plaintiff, being then and there under the immediate care, custody and control of plaintiff," construed liberally in favor of plaintiff, did not admit contributory negligence.—*Jackson v. Sumpter Valley Ry. Co.* 455.

PLEADINGS.

2. An answer, in an action against a railway company for killings cows on its track, which alleges that plaintiff negligently herded "certain" cows along the right of way within switch limits at a station, with knowledge of the danger, and that he negligently permitted the stock to remain on and along the track, and that thereby the stock sustained injuries, etc., does not, on a strict construction, raise the defense of contributory negligence, in the absence of any identification of the "certain" cows with those whose killing is sued for.—*Jackson v. Sumpter Valley Ry. Co.* 455.

CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

3. In an action against a railway company for killing animals on its track, the question of contributory negligence of the owner, held for the jury.—*Jackson v. Sumpter Valley Ry. Co.* 455.

INJURY TO ANIMALS—CONTRIBUTORY NEGLIGENCE.

4. Whether one is guilty of contributory negligence in turning his stock out to graze on uninclosed lands near a railroad track, is a question for the jury.—*Jackson v. Sumpter Valley Ry. Co.* 455.

RAILROADS—INJURY TO ANIMALS—STATION GROUNDS.

5. In an action against a railroad for injuries to animals on its track, the evidence showed that there were about one and one-half miles of unfenced track from one station towards another; that it was three-quarters of a mile from the station to the head of a switch for a siding running back toward the station used for storing engines, etc., and that further on in the direction of the other station, about one hundred and fifty yards from the switch was a branch line leaving the main line and forming the head of a "Y." The animals were killed near the switch for the siding. There was nothing to show that the siding was used in connection with a depot at the station. Held, that the question whether the animals entered the track within depot grounds was for the jury.—*Jackson v. Sumpter Valley Ry. Co.* 455.

RAILROADS AND STREET RAILROADS—RULES AS TO SPEED.

6. The rules governing the management and speed of steam railroads and electric street railways are not always the same, and a rule that is applicable to one may not be controlling against the other.—*Wolf v. City Ry. Co.* 64.

RECORDS.

FILING FOR RECORD—NECESSITY OF INDORSEMENT.

A paper is filed for record in contemplation of law when it is delivered to the proper officer with the intention that it shall become part of the official record, and by him received to be kept on file, and the filing is not affected by the officer's failure to indorse the paper as filed.—*Bade v. Hibberd*, 501.

Not Impeached by *Ex parte* Affidavits. See JUSTICE OF THE PEACE, 6.
 Cannot Impeach Records by *Ex parte* Affidavits. See APPEAL AND
 ERROR, 18.

REFERENDUM.

Petition For, What to Contain. See STATUTES, 3.

REMEDY AT LAW.

Injunction Not Proper in Boundary Dispute. See TRESPASS, 2.

REPLEVIN.

FINDINGS—SUFFICIENCY.

1. In replevin, the findings support a judgment for defendant, where they conform to the new matter averred in the answer and disprove plaintiff's right, though there are no findings conformable to the complaint, no request having been made therefor.—*Freeman v. Trummer*, 287.

NATURE OF REMEDY

2. An action to recover the possession of specific personalty, though designated, under Section 281, B. & O. Comp., as "claim and delivery," is substantially the ancient remedy of replevin.—*Freeman v. Trummer*, 287.

SET-OFF.

3. Replevin being in the nature of an action *ex delicto*, a set-off of accounts between the parties cannot be settled.—*Freeman v. Trummer*, 287.

DEFENSES AVAILABLE.

4. In replevin for a cash register, defendant may show that plaintiff traded cash registers with defendant's bailee, knowing of defendant's ownership, and prevent plaintiff recovering his register until he returns defendant's.—*Freeman v. Trummer*, 287.

WRONGFUL TAKING—NECESSITY FOR DEMAND.

5. In replevin, demand is unnecessary where the taking is wrongful.—*Brown v. Lewis*, 358.

REQUESTED INSTRUCTIONS. See INSTRUCTIONS TO JURIES, 4, 8, 41.

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RULES OF COURT.

DIMINUTION—SUPPLYING OMITTED PAPERS.

Under Rule 35 (50 Or. 567, 569) a motion to dismiss an appeal because of an incomplete record may be considered a suggestion of diminution, and the missing record may be ordered supplied, in the discretion of the court.—*Leavenworth v. McGee*, 238.

RULES CONSTRUED.

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Dismissing Appeals Because of Defective Record. See APPEAL, 21.

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SALES.

EXCHANGE OF PROPERTY—DISTINGUISHED FROM SALE.

1. An "exchange" as distinguished from a "sale" is a contract whereby specific property is given in consideration of the receipt of property other than money.—*Freeman v. Trummer*, 287.

RESALE—FORMER BID RENEWED.

2. Under Section 242, Subd. 1, B. & O. Comp., providing that on a resale on execution the purchaser's bid at the former sale shall be deemed renewed, and no bid shall be taken except for a greater amount, and by subdivision 3, providing for a repayment to the former purchaser, if the property sell for a greater amount to another, where the court in ordering a resale did not include therein any release of plaintiff in execution from his bid, he continued to be bound by it, and the sheriff was bound to consider it as renewed.—*Miller v. Achurch*, 478.

SELF-DEFENSE.

When One Cannot Claim Self-Defense. See HOMICIDE, 2.

Not an Element in Case of Assault With Cowhide, Being Armed. See ASSAULT AND BATTERY, 1.

SESSION LAWS OF OREGON, Construed in this Volume.

See Table in Front of This Volume.

SET OFF AND COUNTERCLAIM. See PLEADING.

STATUTES.

STATUTES—DIRECTORY PROVISIONS.

1. Laws 1907, p. 399, providing for the carrying into effect of the initiative and referendum powers reserved to the people, provided (section 1) a form of petition, which was required to be substantially followed. The form contained a warning clause that it was a felony for any one to sign any such petition with any name other than his own, or to knowingly sign his name more than once to the same measure, or to sign such petition when he was not a legal voter. Section 2 of same act declares that the form given was not mandatory, and if substantially followed in any petition it will be sufficient, regardless of clerical or mere technical errors. *Held*, that the form, in so far as it contained the warning clause, was merely directory, and that a referendum petition omitting such clause was not thereby fatally defective.—*Stevens v. Benson*, 269.

ENFORCEMENT—STATUTES.

2. Laws 1907, p. 399, providing the procedure to facilitate the enforcement of the initiative and referendum powers reserved to the people by Const. Or. Art. IV, § 1, as amended in 1902, was a proper exercise of legislative power, though the constitutional provision was self-executing.—*Stevens v. Benson*, 269.

REFERENDUM—PETITION.

3. Laws 1907, p. 399, § 1, provides a form of petition for the carrying into effect of the referendum powers reserved to the people, and section 2 declares that every sheet of the petition for petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed by the initiative petition, but such petition may be filed with the Secretary of State in numbered sections, for convenience in handling, and referendum petitions shall be attached to a full and correct copy of the measure on which the referendum is demanded and may be filed in numbered sections in like manner. *Held*, that, while an initiative petition is required to contain a correct copy of the title of the act, a referendum petition containing a full and correct copy of the act without the title is sufficient.—*Palmer v. Benson*, 277.

STATUTORY CONSTRUCTION.

4. Where several statutory provisions are included in the same act and adopted together, they should be construed together, and if possible, all be made effective.—*Dutro v. Ladd*, 120.

UNAMBIGUOUS TERMS.

5. When the language of a statute is clear and unambiguous the courts should declare the meaning imported and not resort to rules of construction for some other meaning.—*Dutro v. Ladd*, 120.

"LOCAL STATUTE"—PROPERTY BENEFITED BY ROAD IMPROVEMENT.

6. Within Const. Art. IV, § 23, subd. 10, forbidding the enactment of special or local laws for the assessment and collection of taxes for State, county, township, or road purposes, Act February 22, 1905 (Laws 1905, p. 410), providing for the improvement of roads at the expense of the lands benefited thereby on petition of a majority of the resident landowners, etc., is general and applicable throughout the State, and is not a local statute applicable only to a particular locality or limited part of the State and the inhabitants of that part, though its operation is contingent, depending on the wish of the landowners in the vicinity of a proposed improvement and the existence of certain conditions.—*St. Benedict's Abbey v. Marion County*, 411.

CONSTITUTIONAL LIMITATION ON POWER OF LEGISLATURE TO CREATE MUNICIPAL CORPORATIONS.

7. The Constitution of Oregon, Art. XI, § 2, as amended in 1906, providing that corporations may be formed under general laws, and that the legislature shall not enact or repeal any charter or act incorporating any municipality, city or town, now prohibits the legislature from creating any corporation of any kind by a special act.—*Farrell v. Port of Columbia*, 169.

PORT OF COLUMBIA A SPECIAL PUBLIC ACT.

8. The act incorporating the Port of Columbia (Laws 1907, pp. 182, 190), is a special public act creating a corporation, and is in direct violation of Const. Or. Art. XI, § 2, as amended in 1906; *Dunn v. State University*, 9 Or. 357, and *Lignett v. Ladd*, 23 Or. 33, distinguished.—*Farrell v. Port of Columbia*, 169.

SPECIAL LEGISLATION.

9. Laws 1905, p. 327, making it an offense for proprietors of places where liquor is kept for sale at retail, to permit a female under the age of 21 years to remain in or about the place, is not special legislation because excepting there-

from any open and public restaurant or dining room; this being a classification that the State in the exercise of its police powers can lawfully make.—*State v. Baker*, 381.

VETO POWER—ABSENCE OF CONSTITUTIONAL PROVISIONS

10. In a democratic form of government, the authority of an executive to veto an enactment of the legislative department, is not an inherent power, and can be exercised only when sanctioned by a constitutional provision.—*State v. Kline*, 426.

STATUTES OF OREGON Construed in This Volume. See Table in Front of This Volume.

STATUTES OF THE UNITED STATES Considered in This Volume. See Table in Front of This Volume.

STOCK—Corporate Stock. See CORPORATIONS, 8.

STRAP. Assault With While Armed. See ASSAULT AND BATTERY, 1.

STREETS.

Control of Roads Within City Limits. See MUNICIPAL CORP., 1, 4.

Selling Lots With Reference to Plat. See DEDICATION, 2.

STREET RAILROADS.

INJURY TO PERSONS ON TRACK—EVIDENCE.

1. In an action for the death of plaintiff's intestate, caused by his being struck by a street car, evidence examined, and that of a certain witness for plaintiff held not so opposed to all reasonable probabilities as to require its exclusion, as a matter of law, from the jury.—*Wolf v. City Ry. Co.* 64.

INJURY TO PEDESTRIAN AT CROSSING—CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.

2. A person about to cross a street at a crossing is not bound to wait because a car is in sight; but if the car is at such a distance that he has time to cross, if it is run at the usual speed, it is not negligence, as a matter of law, to attempt to do so.—*Wolf v. City Ry. Co.* 64.

ACCIDENT AT CROSSING—CARE REQUIRED.

3. It is the duty of a street railway company, in operating its cars at street crossings, to use such care as is proportionate to the danger likely to be encountered, regardless of whether the rate of speed has been limited by statute or ordinance, or not.—*Wolf v. City Ry. Co.* 64.

REASONABLENESS OF SPEED IS FOR JURY.

4. Whether a given speed was reasonable for a street car in a large city at a crossing in a residence district is a question that should be submitted to the jury.—*Wolf v. City Ry. Co.* 64.

EVIDENCE—SUFFICIENCY.

5. That at the time a pedestrian was struck by a street car there were seven persons at or near the crossing justifies an inference that the street was much used.—*Wolf v. City Ry. Co.* 64.

RAILROADS AND STREET RAILROADS—RULES AS TO SPEED.

6. The rules governing the management and speed of steam railroads and electric street railways are not always the same, and a rule that is applicable to one may not be controlling against the other.—*Wolf v. City Ry. Co.* 64.

SUMMONS. Same as PROCESS.

Effect of Filing Complaint Without Service. See LIM. OF ACTIONS, 1.

TAXATION.

STATUTORY PROVISION FOR COLLECTION.

1. The extension of the taxes on the assessment roll is part of the process of collection and is no part of the assessment, apportionment or levy.—*Waterhouse v. Clatsop County*, 176.

RECOVERY OF TAXES PAID.

2. Where a void tax is voluntarily paid, it cannot be recovered back.—*Eugene v. Lane County*, 464.

MUNICIPAL TAXATION.

3. Under Section 3004, B. & C. Comp., where a county tax collector collects a void municipal tax and turns it over to the municipality, the remedy of the

taxpayer (if he has saved his rights), is against the municipality, and not against the county; hence the county having collected a void city tax, voluntarily paid by the taxpayer, is not justified in refusing to pay it over.—*Eugene v. Lane County*, 468.

For Public Improvements. See MUNICIPAL CORPORATION, 1-3.

Expense of Road Improvements. See HIGHWAYS, 1.

TENANCY IN COMMON.

PARTITION—POSSESSION—TENANTS IN COMMON—BURDEN OF PROOF.

1. The burden is on the plaintiff in partition, unless the suit is by one or more tenants in common of a vested remainder or reversion, to allege and prove, if denied, that he and defendant were in possession as tenants in common at the time of the commencement of the suit.—*Frye v. Moffet*, 496.

TENDER.

PAYMENT INTO COURT—CONDITIONAL TENDER—WITHDRAWAL.

1. Where, in forcible entry and detainer, defendant answered that he had tendered plaintiff \$115 on July 1, 1903, and a like amount on August 1 of the same year, as rent for those months pursuant to an alleged oral contract for a lease, and that he brought said sum into court and deposited it with the clerk for plaintiff, he could not thereafter claim that the tender was conditional only as a part payment on the oral contract, and having paid the money into court, could not withdraw it without plaintiff's consent.—*Dechenbach v. Rima*, 540.

RIGHT TO UNCONDITIONAL TENDER.

2. Where defendant paid money into court for rent already earned under an alleged parol contract for a lease, the tender being unconditional, plaintiff was entitled to the money whether defendant was successful in enforcing the alleged parol contract for a lease or not.—*Dechenbach v. Rima*, 540.

TRANSITORY ACTIONS.

Venue in, Against Non Residents. See VENUE, 3.

TRESPASS.

PLEADING—SURPLUSAGE.

1. Where a cause of action to recover triple damages for the cutting of timber is defectively framed under Section 348, B. & O. Comp., authorizing such action, but enough is alleged to constitute a cause of action to restrain such cutting as a trespass or the commission of waste, the allegations under the statutes will be treated as surplusage, and the cause retained.—*Roots v. Boring Junction Lumber Co.*, 204.

BOUNDARY DISPUTE—INJUNCTION—REMEDY AT LAW.

2. A suit for an injunction to restrain a trespass should not ordinarily be used to determine a disputed boundary line, such an injunction being sparingly used because the plaintiff has usually a remedy at law or an equitable remedy by a suit to determine a disputed boundary, both which are less severe than the remedy by injunction.—*Hume v. Burns*, 124.

INJUNCTION AGAINST TRESPASS—INSOLVENCY OF DEFENDANT.

3. The insolvency of defendant is not reason for entertaining a suit to enjoin a trespass, where the main purpose is to determine a boundary line and obtain possession of real property.—*Hume v. Burns*, 124.

ENJOINING TRESPASS—IRREPARABLE INJURY.

1. To justify a court of equity in enjoining a trespass it must appear that an irreparable injury will be inflicted unless the writ is issued.—*Wolfer v. Hurst*, 218.

TRESPASS—TRIAL—INSTRUCTIONS.

5. Where, in trespass to land, defendants relied upon its user for several years as a highway while the land was public domain, an instruction that by United States statute a right of way for highways is granted over public lands, and long-continued user by the public is "sufficient" to establish an acceptance of the grant, was not objectionable as declaring long-continued user "essential" to the establishment of the highway.—*Montgomery v. Somers*, 259.

TRIAL.

INSTRUCTIONS—SUFFICIENCY OF AS A WHOLE.

1. Where an instruction as a whole clearly states the law as to the measure of damages for personal injury, and the jury could not have been misled thereby, it will not be held insufficient on account of the wording of a portion thereof.—*Ridings v. Marion County*, 30.

DEMURRER TO EVIDENCE BEFORE DEFENDANT RESTS.

2. A defendant cannot demur to plaintiff's testimony, unless he also rests his case, and a motion for nonsuit is the only proceeding for insufficiency of evidence open to defendant at the close of plaintiff's case.—*Brown v. Lewis*, 368.

EVIDENCE—ORDER OF PROOF—DISCRETION OF COURT.

3. Where defendant placed in evidence during plaintiff's evidence in chief, a check given by defendant to plaintiff, containing a memorandum implying that it was for the balance due on an item of plaintiff's claim, and introduced evidence to show that plaintiff received the check without objecting to the memorandum, the court could in its discretion allow plaintiff in rebuttal to testify that the memorandum was not on the check when he received it.—*Bade v. Hibberd*, 501.

FINDINGS—REQUISITES.

4. When an action is tried without a jury, the findings are equivalent to special verdicts and must be as broad as the material issues.—*Freeman v. Trummer*, 287.

SAME.

5. If findings support the judgment and conform to the theory of the prevailing party, they are sufficient.—*Freeman v. Trummer*, 287.

EVIDENCE—ORDER OF PROOF—STATUTORY PROVISIONS.

6. In an action by a bank on notes transferred to it without endorsement, admission of evidence tending to show that the original holder had agreed to cancel the notes before showing that the one transferring the notes to the bank had knowledge of the agreement, is not error, in view of Section 842, B. & C. Comp., providing that the order of proof shall be regulated by the sound discretion of the court.—*First Nat. Bank v. McCullough*, 508.

SCOPE OF OBJECTIONS TO EVIDENCE.

7. An objection to testimony on specified grounds waives all other grounds of objection not included within those named.

An objection to a question asked of an expert on the ground that he was not qualified to testify does not include an objection that the proper hypothesis had not been given.—*Hildebrand v. United Artisans*, 159.

NONSUIT.

8. The province of a motion for nonsuit is in the nature of a demurrer to the evidence, and when it is sought to take advantage of a defect in the pleadings by such a motion, the pleadings should be construed liberally, as if on a motion by defendant for judgment, notwithstanding the verdict against him.—*Jackson v. Sumpter Valley Ry. Co.*, 455.

QUESTION FOR JURY—EVIDENCE.

9. Where different deductions may reasonably be drawn from the evidence in a cause, the issues are for the jury; and, to justify the granting of a nonsuit, the facts and inferences must be undisputed.—*Jackson v. Sumpter Valley Ry. Co.*, 455.

ORDER OF PROOF.

10. Where, in an action against a carrier for loss of goods, it relied on a limited liability contract, defendant, though entitled to introduce such contract as a part of its case, had no right to introduce it as a part of plaintiff's cross-examination, or to ask plaintiff whether at any time prior to the shipment his attention was directed by the carrier's agent, or by any one, to any of the printed matter on the back of the contract.—*McGregor v. Oregon R. & N. Co.*, 527.

INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

11. Requested instructions substantially covered by the general charge are properly refused.—*McGregor v. Oregon R. & N. Co.*, 527.

NONSUIT—INFERENCES FROM EVIDENCE.

12. On a motion for a nonsuit every reasonable inference from the evidence must be deduced in favor of the plaintiff, and those facts must be assumed to be true which the jury might fairly find under the testimony.—*Putnam v. Stalker*, 210.

SEPARATE TRIAL OF DEFENDANTS—MISDEMEANOR—REVIEW OF COURT'S DISCRETION.

13. Under Section 1385, B. & C. Comp., providing that when two or more defendants are jointly indicted for a felony, any defendant requesting it must be tried separately, but that in other cases defendants jointly indicted may be tried separately or jointly, in the discretion of the court, refusal on appeal from justice's court to grant separate trials to persons charged with a misdemeanor, will not be held error, when the bill of exceptions does not show that the court abused its discretion.—*State v. Kline*, 426.

DISCRETION AS TO QUESTIONS NOT SHOWING BIAS.

14. Objections to questions tending to humiliate a witness, but not to show bias or prejudice, are wisely sustained in the discretion of the trial court.—*State v. Reyner*, 224.

WAIVER AND CORRECTION OF ERRORS—REFUSAL OF NONSUIT.

15. Though plaintiff did not prove a case sufficient to go to the jury, a refusal of a nonsuit will not be disturbed, if defendant afterward supplied the omission.—*Trickey v. Clark*, 516.

INSTRUCTIONS—FAILURE TO REQUEST.

16. Where a party did not request a direct instruction upon a point, he should not complain of the court's failure to instruct thereon.—*Trickey v. Clark*, 516.

DUTY OF COURT TO REJECT UNREASONABLE TESTIMONY.

17. Where the undisputed circumstances show that the testimony of a witness is so improbable and unreasonable that a fair mind must reject it, the court should withdraw such testimony from the jury.—*Wolf v. City Ry. Co.*, 64.

REVIEW—HARMLESS ERROR—FINDINGS.

18. Under section 406, B. & O. Comp., requiring findings on all material issues in equity cases, and providing that on appeal the cause shall be tried anew without reference to such findings, failure to make findings is not reversible error, where the transcript discloses all the proceedings had and evidence taken below, and especially where the complaining party does not appear to have been prejudiced.—*Sutherland v. Bloomer*, 388.

TRIAL JUDGES.

When Should Withdraw Testimony From Jury. See EVIDENCE, 6.

Not Even Hint at What the Court Thought of the Merits. See CRIMINAL LAW, 8.

TRUSTS.

RESULTING TRUSTS—PAYMENT OF CONSIDERATION FOR CONVEYANCE TO ANOTHER.

1. As a general rule, where one person purchases real estate and pays the purchase price, but takes the deed in the name of another, a resulting trust arises by operation of law in favor of the one furnishing the purchase money.—*De Roboam v. Schmidlin*, 388.

EVIDENCE TO ESTABLISH—PAROL EVIDENCE.

2. Such a trust is exempt from the operation of the statute of frauds, and may be shown by parol.—*De Roboam v. Schmidlin*, 388.

RELATIONSHIP BETWEEN PARTIES—PRESUMPTIONS.

3. Where a deed is taken in the name of one whom the person paying the purchase money is under a legal or moral obligation to provide for, as a wife or child, the presumption is that the purchase was intended as an advancement or settlement, and not in trust for the person furnishing the money, and evidence to overcome this presumption must be of the most satisfactory kind.—*De Roboam v. Schmidlin*, 388.

TIME OF PAYMENT.

4. It is indispensable to the establishment of a trust that payment of the purchase price should actually be made by the person asserting the trust, or that a binding obligation therefor be incurred by him as part of the original transaction at or before the time of conveyance; payment at some subsequent time not being sufficient.—*De Roboam v. Schmidlin*, 388.

WEIGHT AND SUFFICIENCY OF EVIDENCE.

5. Evidence to establish a resulting trust must be clear and convincing, and when the testimony is in doubt, or the evidence conflicting, the legal title must prevail. Evidence examined and held insufficient to establish a resulting trust in favor of a husband in land conveyed to his wife.—*De Roboam v. Schmidlin*, 388.

RESULTING TRUST—EFFECT OF EVIDENCE.

6. In a suit to enforce an alleged resulting trust in certain land, evidence held insufficient to sustain a finding that plaintiff and defendant W. purchased the land jointly, under an agreement that the actual cost of the land was \$7,000 and that plaintiff should be entitled to a certain portion of the entire tract on that basis, but to require a finding that defendant, acting as real estate brokers, sold so much of the land as plaintiff desired in a single tract on a basis of \$7,000 for the entire tract, and themselves took the balance of the tract in detached portions under their option to purchase the entire tract for \$5,000.—*Scott v. White*, 111.

TESTAMENTARY TRUSTS—WHAT COURTS HAVE JURISDICTION.

7. The circuit courts have jurisdiction of the subject matter of trusts created by wills which impose on executors the duties of testamentary trustees, to the exclusion entirely of probate courts.—*Roach's Estate*, 179.

UNITED STATES STATUTES Considered in This Volume.

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VENDOR AND PURCHASER.

ORDINARY PRUDENCE IN MAKING PURCHASES—"GOOD FAITH."

1. Good faith is an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all belief of facts which would render the transaction unconscientious. A want of that caution and diligence which an honest man of ordinary prudence is accustomed to exercise in making purchases is, in judgment of law, a want of good faith.—*Jennings v. Lentz*, 488.

VENDOR AND PURCHASER—NOTICE.

2. Whatever is sufficient to put a subsequent purchaser on inquiry must be considered legal notice to him of the facts inquiry would have disclosed by the exercise of reasonable diligence.—*Jennings v. Lentz*, 488.

VENUE.

CHANGE OF VENUE—AFFIDAVITS—NECESSITY—STATUTORY PROVISION.

1. Under Section 1250, B. & O. Comp., providing that in an action for a felony, where the cause is at issue upon a question of fact, the court may order the place of trial to be changed, when it appears by affidavit, to the satisfaction of the court, that a fair and impartial trial cannot be had in the county, etc., a motion for a change of venue in an action for a felony, when a transfer of the cause is objected to, raises an issue which must be determined by the court from an inspection of affidavits.—*State v. Kline*, 426.

APPEAL—RECORD—BILL OF EXCEPTIONS—CONTENTS.

2. Affidavits for a change of venue must be incorporated in a bill of exceptions and transmitted to the Supreme Court, in order to have the action of the trial court reviewed on appeal. If such action is assigned as error, and where such affidavits are merely certified by the clerk, it does not make them a part of the bill of exceptions, and alleged error in refusing to grant a change cannot be considered.—*State v. Kline*, 426.

VENUE.

3. Under Section 44, B. & O. Comp. transitory actions against a nonresident may be commenced in any county that the plaintiff may select, and personal service anywhere within the State will give the court jurisdiction.—*Brown v. Lewis*, 358.

VERDICT.

Findings Equivalent to Special Verdicts. See TRIAL, 4.

VOLUNTARY PAYMENT.

With Knowledge of All the Facts, Cannot be Recovered. See PAYMENT, 1.

A Void Tax Voluntarily Paid, Cannot be Recovered. See TAXATION, 2.

WAIVER.

Of Objection to Jurisdiction by Form of Answer. See EQUITY, 3.

To Indictment Charging More Than One Crime. See INDICTMENT, 2.

WATERS.

WHAT STREAMS ARE NAVIGABLE—FLOATAGE OF LOGS.

1. In Oregon streams which in their natural state, whether with the usual volume of water or during ordinary recurring freshets, can be profitably used for purposes of commerce, are navigable and must be considered public highways for such purposes.—*Kamm v. Normand*, 9.

NAVIGABLE WATERS—INCREASING VOLUME BY DAMS—FLOODING.

2. A stream not a natural highway for commercial purposes cannot be made so by means of dams or causing sudden floods to the injury of riparian owners, though the use of streams may be improved by dikes or dams that do not materially interfere with the natural flow: *Union Power Co. v. Lichty*, 42 Or. 563, distinguished.—*Kamm v. Normand*, 9.

FLOATAGE OF LOGS—EVIDENCE.

3. The evidence shows that the North Fork of Klaskanle River, in its natural state, cannot be successfully used for floating logs to tide level, except at extreme high water, which usually lasts but a few hours.—*Kamm v. Normand*, 9.

FLOATABLE STREAM.

4. A stream that in its natural condition will not carry saw logs, except at times of very high water, which usually lasts but a few hours, and then only small and medium sized logs, is not a navigable stream or a highway for the purpose of floatage.—*Kamm v. Normand*, 9.

PUBLIC ADVANTAGE NOT A TEST OF NAVIGABILITY.

5. The navigable or floatable capacity of a stream cannot be determined or affected by its importance to public or private interests, and any rights claimed must be based on the actual condition of the stream or upon some constitutional proceeding, confiscation being a method of acquiring property not recognized by the courts of the United States.—*Kamm v. Normand*, 9.

WATER COURSES—OBSTRUCTION OF FLOW—MAINTENANCE OF DAM.

6. Where complainants and their predecessors in interest for more than 20 years had asserted and exercised a right each year to construct and maintain, whenever necessary, a temporary dam or obstruction in the main channel of a river to divert water into a creek for irrigation purposes, without any intimation from defendants or their predecessors in interest that complainants' right to maintain the dam was questioned, complainants acquired a prescriptive right to maintain it, notwithstanding defendants clandestinely and without complainants' knowledge at various times forcibly destroyed the works so maintained.—*Brattain v. Conn*, 156.

Proper Division of Water Frontage. See **NAVIGABLE WATERS**, 1.

WITNESSES.**EVIDENCE—DAMAGES—CONCLUSION OF WITNESS.**

1. Though a witness may state the facts upon which an alleged damage is predicated, he should not be allowed to give his opinion as to the amount of damages resulting from a given act, that being for the jury to determine.—*Montgomery v. Somers*, 259.

HARMLESS ERROR.

2. Error in an action for trespass to land, in allowing a witness to give his opinion as to the amount of damages resulting from the trespass, was harmless, it appearing that the incompetent testimony did not influence the verdict.—*Montgomery v. Somers*, 259.

PRESUMPTION THAT TESTIMONY WILL SUPPORT VERDICT.

3. Where, in an action for damage to a growing hay crop by trespass, defendant's bill of exceptions to the ruling admitting testimony as to the value of the crop did not contain all the evidence, and there was no statement that testimony was not offered to show how many tons of hay the crop would have made, had it not been injured, or the cost of harvesting, it must be presumed that there was such testimony introduced sufficient to support the verdict.—*Montgomery v. Somers*, 259.

OFFERING EXHIBITS ON CROSS-EXAMINATION.

4. Where a witness has referred to documents on direct examination, the opposite party has a right to have such documents identified and marked as a part of the cross-examination, but it is very doubtful whether they can then be offered in evidence.—*Hildebrand v. United Artisans*, 159.

COMPETENCY—KNOWLEDGE.

5. Where the local secretary of a mutual benefit society, in making out proofs of death of a member, procured the assistance of an attorney, who was also a member of the order, and who subsequently became the attorney of the beneficiary in an action on the benefit certificate, the secretary was competent to testify whether she procured such attorney's aid as a brother member of the order or as an attorney.—*Hildebrand v. United Artisans*, 159.

RELEVANCY OF TESTIMONY.

6. In an action involving the cause of death of a person who was found shot, a hypothetical question asked of medical men as to when *rigor mortis* would set in where a person shot through the temple died almost immediately, is competent, relevant and material.—*Hildebrand v. United Artisans*, 159.

COMPETENCY OF EXPERT WITNESS.

7. A physician testifying as an expert must first be shown to be qualified either by actual experience in similar cases to the one put to him or by such careful and deliberate study as enables him to form a definite opinion of his own with reference to the matter under consideration.—*Hildebrand v. United Artisans*, 159.

CREDIBILITY OF TESTIMONY OF ACCUSED.

8. The court instructed that an accused is deemed a competent witness, and that while the jury should give his testimony such weight and credibility as they might consider it entitled to, yet they were to consider in connection therewith that accused was testifying in his own behalf; that they were not bound to consider his testimony as absolutely true, nor as equal to the testimony of a disinterested witness, but to bear in mind that defendant spoke in his own behalf, and that the jury should consider the great temptation which one so situated was under, so to speak, as to procure his acquittal. *Held*, that the instruction was erroneous, as seeming to leave an implication that it was incumbent on the jury to consider defendant's testimony as false, and for that reason to reject it.—*State v. Bartlett*, 40.

DUTY OF COURT TO REJECT UNREASONABLE TESTIMONY.

9. Where the undisputed circumstances show that the testimony of a witness is so improbable and unreasonable that a fair mind must reject it, the court should withdraw such testimony from the jury.—*Wolf v. City Ry. Co.* 64.

WORDS AND PHRASES.

"EARNINGS."

1. The word "earnings" may mean either gross or net receipts, but in the present instance it is used to indicate net returns.—*Loomis v. MacFarlane*, 129.

"GOOD FAITH."

2. Good faith is an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all belief of facts which would render the transaction unconscientious. A want of that caution and diligence which an honest man of ordinary prudence is accustomed to exercise in making purchases is, in judgment of law, a want of good faith.—*Jennings v. Lentz*, 483.

"PRIMA FACIE EVIDENCE."

3. "Prima facie evidence" is that degree of proof which, unexplained or uncontradicted, is by itself sufficient to establish the truth of a legal principle asserted by a party.—*State v. Kline*, 426.

"PROBABLE CAUSE."

4. The fact that the plaintiff in an action for malicious prosecution was examined before a committing magistrate, when witnesses were called for both sides, and was held to answer, establishes a *prima facie* case of probable cause for the arrest, subject to evidence that the action of the magistrate was induced by fraud or other improper influence.—*Putnam v. Stalker*, 210.

SAME.

5. One who consults the district attorney before commencing a criminal prosecution and discloses to him all the facts which he knows or has reason to believe, and is advised to begin a prosecution, does not act without probable cause, even though by diligent search he might have discovered other and exculpatory facts, if he acted in good faith on the advice so received.—*Putnam v. Stalker*, 210.

"PROPERTY."

6. "Property" means everything of exchangeable value, and includes money, chattels, things in action, and evidence of debt. This also is recognized as including things which may be sold and that may be assessed for taxation. *Fishburn v. Londershausen*, 363.

"SALOON."

7. A "saloon" is a building or place where liquors are kept for sale at retail, and may include more than one room.—*State v. Baker*, 123.

WORDS—ASCERTAINING MEANING.

8. The meaning of a word may be varied by the text in which it is found, and if that does not fix it, resort may be had to parol testimony to ascertain the surrounding circumstances and thereby determine the intention of the parties.—*Loomis v. MacFarlane*, 129.

"Beer." See INTOXICATING LIQUORS, 7.

Meaning of Particular Words. See CONTRACTS, 2.

"Road." See HIGHWAYS, 3.

WRITINGS.

Secondary Evidence of, When Given. See EVIDENCE, 35.

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